Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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This issue contains

T.D. 80-205 through 80-210
General Notice
C.S.D. 80-126 through 80-150
C.A.D. 1252
C.D. 4866
Protest abstracts 80P/116 through 80P/118
Reap. abstracts 80R/223 through 80R/231
International Trade Commission Notices

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 80-205)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Brazil cruzeiro, People's Republic of China yuan, Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical), and Venezuela bolivar

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

Brazil cruzeiro:	
July 7–11, 1980	$0.0190
People's Republic of China yuan:	
July 7, 1980	$0.682687
July 8–11, 1980	.688895
Hong Kong dollar:	
July 7, 1980	$0.203355
July 8, 1980	.203562
July 9, 1980	.203749
July 10, 1980	.203666
July 11, 1980	.203770
Iran rial:	
July 7–11, 1980	Not available
Philippines peso:	
July 7–11, 1980	$0.1345
Singapore dollar:	
July 7, 1980	$0.474158
July 8, 1980	.473149
July 9, 1980	.474046
July 10, 1980	.474383
July 11, 1980	.474608

Thailand baht (tical):
July 7–11, 1980 .... $0.0490
Venezuela bolivar:
July 7–11, 1980 .... $0.2329
(LIQ-3-TRODE)

Dated: August 5, 1980.

G. SCOTT SHREVE
(For Richard Rosettie, Acting
Director, Duty Assessment Division).

(T.D. 80-206)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Brazil cruzeiro, People's Republic of China yuan, Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical), and Venezuela bolivar

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

Brazil cruzeiro:
July 14–17, 1980 .... $0.0191
July 18, 1980 .... .0187
People's Republic of China yuan:
July 14, 1980 .... $0.688895
July 15, 1980 .... .692329
July 16–18, 1980 .... .688895
Hong Kong dollar:
July 14, 1980 .... $0.203749
July 15, 1980 .... .203521
July 16, 1980 .... .203749
July 17, 1980 .... .203687
July 18, 1980 .... .203562
Iran rial:
July 14–18, 1980 .... Not available
Philippines peso:
July 14–18, 1980 .... $0.1345
Singapore dollar:
July 14, 1980 .... $0.473485
July 15–16, 1980 .... .473261

July 17, 1980	.474046
July 18, 1980	.472367
Thailand baht (tical):	
July 14–18, 1980	$0.0490
Venezuela bolivar:	
July 14–18, 1980	$0.2329

(LIQ-3-TRODE)

Dated: August 5, 1980.

G. Scott Shreve
(For Richard Rosettie, Acting
Director, Duty Assessment Division).

(T.D. 80-207)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Brazil cruzeiro, People's Republic of China yuan, Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical), and Venezuela bolivar

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, subpart C).

Brazil cruzeiro:	
July 21–25, 1980	$0.0187
People's Republic of China yuan:	
July 21–25, 1980	$0.688895
Hong Kong dollar:	
July 21, 1980	$0.203521
July 22, 1980	.203749
July 23, 1980	.203355
July 24, 1980	.203252
July 25, 1980	.202922
Iran rial:	
July 21–25, 1980	Not available
Philippines peso:	
July 21–25, 1980	$0.1345
Singapore dollar:	
July 21, 1980	$0.473597
July 22, 1980	.473485
July 23, 1980	.473597

July 24, 1980	.473485
July 25, 1980	.473709
Thailand baht (tical):	
July 21–25, 1980	$0.0490
Venezuela bolivar:	
July 21–25, 1980	$0.2329

(LIQ-3-TRODE)

Dated: August 5, 1980.

G. SCOTT SHREVE
(For Richard Rosettie, Acting
Director, Duty Assessment Division).

(T.D. 80–208)

Manmade Fiber Textile Products—Restriction on Entry

Restriction on entry of manmade fiber textile products manufactured or produced in Malaysia

There is published below a directive of June 6, 1980, received by the Commissioner of Customs from the acting chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of manmade fiber textile products in category 613 manufactured or produced in Malaysia. This directive amends, but does not cancel, that committee's directive of December 11, 1979 (T.D. 80–52).

This directive was published in the Federal Register on June 11, 1980 (45 F.R. 39528), by the committee.

(QUO-2-1)

Dated: August 6, 1980.

WILLIAM D. SLYNE
(For Chester R. Krayton,
Director, Duty Assessment Division).

U.S. DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,
Washington, D.C., June 6, 1980.

Committee for the Implementation of Textile Agreements

COMMISSIONER OF CUSTOMS,
Department of the Treasury,
Washington, D.C.

DEAR MR. COMMISSIONER: This directive further amends, but does not cancel, the directive issued to you on December 11, 1979, by the

chairman, Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton, wool, and manmade fiber textile products, produced or manufactured in Malaysia.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of May 17 and June 8, 1978, as amended, and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on June 6, 1980, and for the 12-month period which began on January 1, 1980, and extends through December 31, 1980, entry into the United States for consumption and withdrawal from warehouse for consumption of manmade fiber textile products in category 613, produced or manufactured in Malaysia, in excess of 2,660,000 square yards.[1]

The action taken with respect to the Government of Malaysia and with respect to imports of manmade fiber textile products from Malaysia has been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

ARTHUR GAREL,
Acting Chairman, Committee for the Implementation of Textile Agreements.

(T.D. 80–209)

Cotton Textile Products—Restriction on Entry

Restriction on entry of cotton textile products manufactured or produced in Malaysia

There is published below a directive of July 24, 1980, received by the Commissioner of Customs from the chairman, Committee for the Implementation of Textile Agreements, concerning restriction on entry of cotton textile products in certain categories manufactured or produced in Malaysia. This directive amends, but does not cancel, that committee's directive of December 11, 1979 (T.D. 80–52).

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[1] The level of restraint has not been adjusted to reflect any imports after Dec. 31, 1979.

This directive was published in the Federal Register on July 29, 1980 (45 F.R. 50378), by the committee.

(QUO-2-1)

Dated: August 11, 1980.

William D. Slyne
(For Richard R. Rosettie, Acting Director, Duty Assessment Division).

U.S. Department of Commerce,
International Trade Administration,
Washington, D.C., July 24, 1980.

Committee for the Implementation of Textile Agreements

Commissioner of Customs,
Department of the Treasury,
Washington, D.C.

Dear Mr. Commissioner: This directive further amends, but does not cancel, the directive issued to you on December 11, 1979, by the chairman, Committee for the Implementation of Textile Agreements, concerning imports into the United States of certain cotton, wool, and manmade fiber textile products, produced or manufactured in Malaysia, and exported during the 12-month period which began on January 1, 1980.

Under the terms of the Arrangement Regarding International Trade in Textiles done at Geneva on December 20, 1973, as extended on December 15, 1977; pursuant to the Bilateral Cotton, Wool and Man-Made Fiber Textile Agreement of May 17 and June 8, 1978, as amended; and in accordance with the provisions of Executive Order 11651 of March 3, 1972, as amended by Executive Order 11951 of January 6, 1977, you are directed to prohibit, effective on August 1, 1980, and for the 12-month period beginning on January 1, 1980, and extending through December 31, 1980, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textile products in category 333/334/335, produced or manufactured in Malaysia, in excess of the following level of restraint:

Category	*12-month level of restraint* [1]
333/334/335	60,380 dozen of which not more than 24,127 dozen shall be in category 333; not more than 21,147 dozen shall be in category 334; and not more than 21,147 dozen shall be in category 335.

[1] The level of restraint has not been adjusted to reflect any imports after Dec. 31, 1979.

Cotton textile products in category 333/334/335 which have been exported to the United States prior to January 1, 1980, shall not be subject to this directive.

Cotton textile products in category 333/334/335 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1484(a)(1)(A) prior to the effective data of this directive shall not be denied entry under this directive.

A detailed description of the textile categories in terms of TSUSA numbers was published in the Federal Register on February 28, 1980 (45 F.R. 13172), as amended on April 23, 1980 (45 F.R. 27463).

In carrying out the above directions, entry into the United States for consumption shall be construed to include entry for consumption into the Commonwealth of Puerto Rico.

The actions taken with respect to the Government of Malaysia and with respect to imports of cotton textile products from Malaysia have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, which are necessary for the implementation of such actions, fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

PAUL T. O'DAY,
Chairman, Committee for the Implementation of Textile Agreements.

(T.D. 80-210)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., August 12, 1980.

Notice is hereby given that pursuant to section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with pay period beginning August 24, 1980.

324-903 O - 80 - 2

Installation:	Biweekly excess cost
Montreal, Canada	$15, 984
Toronto, Canada	31, 347
Kindley Field, Bermuda	5, 315
Nassau, Bahama Islands	18, 844
Vancouver, Canada	20, 974
Winnipeg, Canada	1, 969
Freeport, Bahama Islands	17, 036
Calgary, Canada	9, 019
Edmonton, Canada	9, 817

JACK T. LACY, *Comptroller*.

[Published in the Federal Register, Aug. 18, 1980 (45 F.R. 54931)]

U.S. Customs Service

General Notices

(TMK-2-RRUEE)

Notice of Application for Recordation of Trade Name R.B.K. Importers, Inc.

Application has been filed pursuant to section 133,12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name R.B.K. Importers, Inc., used by R.B.K. Importers, Inc., a corporation organized under the laws of the State of Delaware, located at 940 South Alameda Street, Los Angeles, Calif. 90021.

The application states that the trade name is associated with women's wearing apparel and sportswear including but not limited to sweaters, skirts, tops, jackets, shirts, jeans, and slacks. The application states further that no foreign firm is authorized to use the trade name sought to be recorded. Appropriate accompanying papers were submitted with the application.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Any such submission should be addressed to the Commissioner of Customs, Washington, D.C. 20229, in time to be received not later than 30 days from the date of publication of this notice in the Federal Register.

Notice of the action taken on the application for recordation of the trade name will be published in the Federal Register.

Dated: August 8, 1980.

Donald W. Lewis,
Director, Office of Regulations and Rulings.

(TMK-2-RRUEE)

Notice of Application for Recordation of Trade Name Donnkenny, Inc.

Application has been filed pursuant to section 133.12, Customs regulations (19 CFR 13.12), for the recordation under section 42 of the

act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name Donnkenny, Inc., used by Donnkenny, Inc., a corporation organized under the laws of the State of Delaware, located at 1411 Broadway, New York, N.Y. 10018.

The application states that the trade name is associated with women's wearing apparel and sportswear including but not limited to sweaters, skirts, tops, jackets, shirts, jeans, and slacks. The application states further that no foreign firm is authorized to use the trade name sought to be recorded. Appropriate accompanying papers were submitted with the application.

Before final action is taken on the application, consideration will be given to any relevant data, views, or arguments submitted in writing by any person in opposition to the recordation of this trade name. Any such submission should be addressed to the Commissioner of Customs, Washington, D.C. 20229, in time to be received not later than 30 days from the date of publication of this notice in the Federal Register.

Notice of the action taken on the application for recordation of the trade name will be published in the Federal Register.

Dated: August 8, 1980.

SALVATORE E. CARAMAGNO,
Acting Director, Office of Regulations and Rulings.

(521743)

Garments With Traditional, but Primarily Decorative Features: Garments With Simulated Features: Ornamented Wearing Apparel; Change of Practice Considered: 19 CFR Part 177

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed change of practice.

SUMMARY: This document gives notice that the Customs Service is reviewing the current uniform and established practice of classifying certain garments with traditional, but primarily decorative, features as nonornamented wearing apparel. The practice of classifying certain garments with simulated features as nonornamented is also under review. The Customs Service is considering whether it must classify garments with traditional, but primarily decorative features, and garments with simulated features, as ornamented wearing apparel. The Customs Service is seeking public comment as to whether a recent decision of the Customs Court requires these changes.

DATE: Comments (preferably in triplicate) must be received on or

before (30 days from the date of publication of this notice in the Federal Register).

ADDRESS: Comments should be addressed to the Commissioner of Customs, attention: Regulations and Research Division, 1301 Constitution Avenue NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Philip Robins, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-8181.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to uniform and established practices, the Customs Service has classified various types of garments with traditional features which are also decorative as nonornamented wearing apparel. These features have included epaulets on raincoats, bush-safari jackets, and military-style garments, D-rings on the belts of trenchcoats, and overlaid yokes on Western-style shirts. It has also been the practice to classify garments with simulated features as nonornamented wearing apparel on the ground that the simulation is of a feature otherwise functional. These features have included simulated buttonholes, pockets, pocket flaps, belts and belt segments, or front openings (plackets).

Recently, in *The Ferriswheel* v. *United States*, C.D. 4844 (Feb. 21, 1980), the U.S. Customs Court held Scottish Highland jackets, having traditional (but primarily decorative) epaulets, and braid which simulates buttonholes, to be thereby ornamented. In holding the merchandise to be classifiable as ornamented wearing apparel, the court found the jacket epaulets and braid to be primarily ornamental or decorative, i.e., intended primarily to enhance the beauty and appearance of the garments by adornment or embellishment. *Blairmoor Knitwear Corp.* v. *United States*, 60 Cust. Ct. 388, C.D. 3396, 284 F. Supp. 315 (1968). That the ornamental braid and epaulets are traditional in Highland dress, the court held, did not preclude classification as ornamented wearing apparel. While *Ferriswheel* upheld the Customs classification in that case, this opinion may be contrary to Customs' uniform and established practice of classifying other types of garments with traditional, but primarily decorative features, as nonornamented wearing apparel.

PROPOSED CHANGE OF PRACTICE

The Customs Service is considering whether the opinion in the *Ferriswheel* case requires it to classify all garments having traditional, but primarily decorative, features as ornamented wearing apparel. Such a change of practice might affect raincoats, bush-safari jackets, and military-style garments, all having epaulets, trenchcoats with

D-rings, and Western-style shirts with overlaid yokes, as well as all other garments with traditional features which might be considered to be primarily decorative.

The Customs Service is also considering whether the opinion in this case also requires it to classify garments with simulated features as ornamented wearing apparel. Subject to this change of practice would be garments with simulated buttonholes, pockets, pocket flaps, belts and belt segments, or front openings (plackets), as well as garments with any other simulated feature, notwithstanding that such simulation is of a feature otherwise functional.

The Customs Service seeks public comment as to the applicability of this opinion and as to whether these traditional and simulated features are primarily decorative or primarily functional.

AUTHORITY

Inasmuch as the proposed change of practice will affect the assessed duties on garments subject to such change, the Customs Service is giving this notice and opportunity for comment in accordance with section 315(d) of the Tariff Act of 1930, as amended (19 U.S.C. 1315(d)), and section 177.10(c)(1) of the Customs Regulations (19 CFR 177.10(c)(1)).

Consideration will be given to any written comments submitted in writing to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.8(b), Customs Regulations (19 CFR 103.8(b)), during regular business hours at the Regulations and Research Division, Headquarters, room 2426, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229.

DRAFTING INFORMATION

The principal author of this notice was Harold I. Loring, Regulations and Research Division, U.S. Customs Service. However, personnel from other offices of the U.S. Customs Service participated in developing this notice, both on matters of style and substance.

R. E. CHASEN,
Commissioner of Customs.

Approved: August 5, 1980.
RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

Dated: August 8, 1980.

DONALD W. LEWIS,
Director, Office of Regulations and Rulings.

(C.S.D. 80-126)

Carrier Control: Treatment of Aircraft as Commercial or Private for Customs Purposes

Date: October 10, 1979
File: AIR-4-02-R:CD:C
104245 JM

This ruling concerns the treatment of an aircraft as private or commercial for purposes of Customs clearance.

Issue.—Is an aircraft, owned and leased by one part owner of an air charter service to another part owner of the air charter service and piloted by an employee of the air charter service, considered to be private or commercial when used by the Lessee to transport prospective customers of a construction company owned solely by the Lessee?

Facts.—On July 31, 1979, an aircraft owned by (person) (lessor), of Bismarck, N. Dak., was leased to (company No. 1) (lessee), of the same city for a term of 2 years. The lease provided that the lessor was responsible for normal maintenance of the aircraft, that the lessor would furnish fuel and oil for the aircraft, that the lessor would pay charges for hanger and other airport facilities while the aircraft is in

Bismarck, and that the lessee would pay the lessor "a sum equal to 76 cents per mile travel." The lease also provided that the lessor could use the aircraft or lease it to others so long as it did not interfere with the lessees' anticipated use thereof.

On August 1, 1979, the aircraft left the United States, proceeded to Canada, where it loaded directors (or board members) of a local grain elevator, and transported these persons to cities in the United States where the lessee was constructing grain handling facilities. The aircraft was piloted on this flight by (person) an employee of (company No. 2), an air charter service partly owned by the lessor and partly owned by (company No. 1) who is the lessee. A penalty was issued against the pilot for failing to obtain outward clearance and failing to file an outward general declaration prior to the aircraft's departing the United States to take aboard passengers for hire outside the United States. The pilot has requested relief stating that non-owner passengers were not charged for the trip and, therefore, the trip would not be considered commercial under Customs laws. The Acting Director of Customs, Pembina, N. Dak., has requested internal advice, under the provisions of section 177.11, Customs Regulations, concerning the treatment of the aircraft as private or commercial for the purposes of Customs clearance.

Law and analysis.—Customs has defined "private aircraft" as any civil aircraft engaged in a personal or business flight to or from the United States and not carrying passengers and/or cargo for compensation or hire, nor departing from the United States for purposes of loading passengers and/or cargo for compensation or hire. This definition interprets section 6.3 (a) and (c), Customs Regulations, relating to entry and clearance of aircraft and is in agreement with the definition of "private aircraft" contained in title 49, United States Code, section 1741. The term "private aircraft" is defined in section 1741(d)(1) as "any civilian aircraft not being used to transport persons or property for compensation or hire." Guidelines on the application of section 1741(d)(1), and section 6.3, Customs Regulations, state that for Customs purposes, a person transported for compensation or hire on an aircraft is a person who would not be transported unless there was some payment by or for him and who is not connected with the operation of the aircraft or its navigation, ownership, or business.

In the present case, the method of payment is somewhat different than that of the usual airline passenger. However, it is clear that none of the prospective customers of (company No. 1) would be transported on the flight without payment of the amount agreed to in the lease. The lessee merely paid a charge based on mileage flown

while the lessor retained control of the aircraft (supplying fuel, hanger facilities, and reserving the right to lease the aircraft to third parties). In addition, the pilot was not an employee of the lessee but an employee of the air charter service which is owned partly by the lessor and partly by the lessee. In effect, the lessor furnished an "air transportation service rather than a mere aircraft to be operated by the lessee in the lessee's construction business. Customs has consistently held that such use constitutes commercial use of the aircraft for the purposes of Customs entry and clearance laws and has published this concept as paragraph 2a in the information sheet, definition of a private aircraft for U.S. Customs purposes, distributed to field offices and the public by the Office of Operations.

Holding.—An aircraft, owned and leased by one part owner of an air charter service to another part owner of the air charter service and piloted by an employee of the air charter service, is a commercial aircraft when used by the lessee to transport prospective customers of a construction company owned solely by the lessee.

(C.S.D. 80-127)

Clearance: Procedure for Aircraft Departing a U.S. Port for a Foreign Port via Another U.S. Port

Date: October 11, 1979
File: AIR-4-02-R:CD:C
104234 JM
104050

This ruling concerns the Customs procedures to be followed when an aircraft of a scheduled airline departs from a U.S. port for a foreign port via another U.S. port.

Issue.—Whether an aircraft of a scheduled airline departing from the U.S. port of origin on a flight for a foreign port via another U.S. port with passengers for the foreign port is required to obtain clearance at the port of origin of the flight.

Facts.—Aircraft depart on scheduled flights from Anchorage, Alaska, to Whitehorse, Yukon Territory, via Fairbanks, Alaska. The District Director at Anchorage previously asked whether clearance from Anchorage for Whitehorse would be required in view of a ruling from the region that in the case of a nonscheduled flight, a permit to proceed is required. The region indicated that, pursuant to section 6.3, 6.5, and 6.8 of the Customs Regulations, a clearance would be required in the case of a scheduled flight. On July 26, 1979, a ruling (104050) was issued by Headquarters, U.S. Customs Service, concern-

324-903 O - 80 - 3

ing this matter. The subject ruling is being issued to modify and clarify the previous ruling.

Law and analysis.—Section 6.5(a), Customs Regulations, states in pertinent part that aircraft operated by scheduled airlines departing for any place outside the United States must clear if the aircraft is (1) beginning a flight in the area, or (2) carrying from the area merchandise which must be listed on the general declarations. "Area" as used in section 6.5(a) is defined as either (1) the States and the District of Columbia or (2) Puerto Rico in section 6.1(c), Customs Regulations. Therefore, section 6.5(a) requires aircraft departing the United States (including the District of Columbia) or Puerto Rico for any place outside of the United States to clear if they are beginning a flight in the United States or Puerto Rico, or are carrying merchandise from the United States or Puerto Rico.

The provisions of section 6.5(a), which make clearance mandatory under the conditions listed above, are separate and distinct from section 6.5(c) which sets out the procedure for obtaining clearance. Section 6.5(c) provides that if an aircraft is required to clear within the meaning of section 6.5(a), then clearance may be obtained at the port of entry nearest each place at which merchandise or passengers, or both, are taken aboard for discharge beyond the area. This procedure is not mandatory but available at the option of the aircraft commander and, if chosen, the clearance obtained is limited to the passengers and merchandise taken aboard at such place. Otherwise, clearance, or permission to depart, for aircraft operated by scheduled airlines shall be obtained at or nearest the place of last takeoff in the area unless some other place is designated by the District Director.

Holding.—Where an aircraft begins a scheduled flight in Anchorage, Alaska, for Whitehorse, Yukon Territory, via Fairbanks, Alaska, section 6.5 of the Customs Regulations allows but does not require, aircraft to obtain at Anchorage a clearance for Whitehorse for any passengers or merchandise laden at Anchorage for Whitehorse. This is because the aircraft is not leaving one area (Anchorage) for another area (Fairbanks) as that term is defined in the regulations. If such clearance is obtained at Anchorage, the aircraft commander or authorized person will obtain at Fairbanks a clearance for Whitehorse for any passengers or merchandise laden at Fairbanks. Otherwise, clearance for the aircraft shall be obtained at Fairbanks unless some other place is designated by the District Director at Anchorage.

(C.S.D. 80-128)

Value: 19 U.S.C. 1402(e); Existence of "Similar" Merchandise as Basis of Appraisement

Date: October 11, 1979
File: R:CV:V GE
061203

Re Application for further review of protest No. 2002-8-000067.

DISTRICT DIRECTOR OF CUSTOMS,
New Orleans, La.

DEAR SIR: This ruling concerns the valuation of cameras imported from Japan by a large retail chain in the United States.

Issue.—Whether the proper basis of appraisement of the subject cameras is U.S. value under 19 U.S.C. 1402 and, if so, whether U.S. value is represented by the invoice price of the subject merchandise.

Facts.—The importer, a nationwide chain of retail department stores, imported cameras manufactured under the importer's brand name (subject cameras) by a company in Japan. The Japanese manufacturer, in addition to selling to the importer, also sells cameras under its own name (other cameras) for export to the United States at a wholesale price higher than the invoice price of the subject cameras.

The importer contends that the cameras imported under the manufacturer's name are not "such or similar imported merchandise" under section 1402(e) of title 19, United States Code, and that the wholesale price of the other cameras is therefore not a proper indication of the U.S. value of the subject cameras. The importer further contends that cost of production, under section 1402(f), is the proper basis of appraisement and is accurately reflected by the invoice price of the subject cameras. Protestant does not contest the determination that due to the manufacturer's restrictions on sales, neither foreign nor export value provide a proper basis of appraisement.

Your office is in agreement that the other cameras are not such merchandise, that is, they are not identical with the subject cameras. However, your office is of the opinion that the other cameras are similar merchandise and that therefore the subject cameras must be appraised under U.S. value.

Law and analysis.—It is the opinion of Headquarters that U.S. value is the proper basis of appraisement in light of the fact that similar merchandise is freely offered for sale for consumption in the United States.

Since the subject cameras are on the final list (T.D. 54521), they should be valued pursuant to title 19, United States Code, section 1402 (old value law).

Section 1402(a) provides, in relevant part:

> For the purposes of this chapter the value of imported articles designated by the Secretary of the Treasury as provided for in section 6(a) of the Customs Simplification Act of 1956 sha l be:
>
> (1) The foreign value or the export value, whichever is higher;
>
> (2) If the appraiser determines that neither the foreign value nor the export value can be satisfactorily ascertained, then the U.S. value;
>
> (3) If the appraiser determines that neither the foreign value, the export value, nor the U.S. value can be satisfactorily ascertained, then the cost of production;

Section 1402(e) in relevant part defines U.S. value as follows:

> The U.S. value of imported merchandise shall be the price at which such or similar imported merchandise is freely offered for sale for domestic consumption, packed ready for delivery, in the principal market of the United States to all purchasers, at the time of exportation of the imported merchandise, in the usual wholesale quantities and in the ordinary course of trade, with allowance made for duty, cost of transportation and insurance, and other necessary expenses from the place of shipment to the place of delivery.

U.S. value exists in this case if the other cameras, which were used as prototype merchandise for appraisement purposes, are similar to the subject merchandise. The similar imported merchandise does not have to be identical to the subject merchandise in order for an appraisement to be made on the basis of U.S. value. Similar merchandise means goods which are commercially interchangeable, are of approximately the same materials, approximately the same price, and adapted to the same uses. See *B. A. McKenzie & Co. Inc.* v. *United States*, 47 CCPA 143 (1960); *United States* v. *Irving Massin & Bros.*, 16 Ct. Cust. App. 19 (11928).

The Area Director is of the opinion that the cameras are commercially interchangeable based on the construction, features, and reputation of the respective cameras, on the fact that the cameras are manufactured by the same company, and the fact that the importer's models change at the same time as the other cameras that are exported by the manufacturer. Further, the cameras are of approximately the same materials, close in terms of price, and adapted to the same uses.

The importer has presented no evidence that the cameras are not similar and that the appraisement based on U.S. value is improper. The difference between the invoice price of the subject cameras and the price of the other imported cameras of approximately 24 percent in itself is not sufficient to establish that the cameras are dissimilar.

Accordingly, we are unable to conclude that the appraising officer acted incorrectly.

Holding.—Therefore, we find that U.S. value under 19 U.S.C. section 1402(e) is the proper basis of appraisement, as represented by the price of similar imported merchandise freely offered for sale in the United States in wholesale quantities, reduced by the appropriate statutory allowances. Pursuant to the foregoing, you are directed to deny the protest in full.

(C.S.D. 80-129)

Drawback: Transfer of Distilled Spirits to Customs Bonded Warehouse as an "Exportation" Under 19 U.S.C. 1313 (a) and (b)

Date: June 3, 1980
File: DRA-1-RRUCDB NK
211231

Issue.—Whether the transfer of distilled spirits from a bonded internal revenue distilled spirits plant or export storage facility to a Customs bonded warehouse for storage pending exportation satisfies the exportation requirement of the drawback law under 19 U.S.C. 1313 (a) and (b).

Facts.—Imported distilled spirits were withdrawn from a Customs bonded warehouse for consumption after the payment of Customs duties. Internal revenue taxes were not paid because the merchandise was transferred to a distilled spirits plant under bond approved by the Bureau of Alcohol, Tobacco, and Firearms. The processing of the merchandise at the distilled spirits plant satisfied the manufacture or production requirement of the drawback law (19 U.S.C. 1313(a)). The merchandise was then transferred to a Customs bonded warehouse, class 3, for storage pending exportation.

Law and analysis.—The act of November 14, 1977, Public Law 95-176, 91 Stat. 1363, amended the Internal Revenue Code relating to imported distilled spirits. Among other things, it extended tax drawback to imported distilled spirits that are packaged or bottled in the United States for export and allowed distilled spirits bottled in bond, or returned to an export storage facility for export, to be transferred without payment of tax to Customs bonded warehouses for storage pending exportation.

Public Law 95-176 concerned drawback of internal revenue tax under certain provisions of the Internal Revenue Code. It did not affect drawback for Customs duties under sections 1313 (a) and (b), title 19, United States Code, and applicable regulations of part 22 of the Customs Regulations. Under these provisions of law, drawback is not applicable unless the articles manufactured or produced

under drawback conditions are exported within certain time limitations. To constitute an exportation within the meaning of sections 1313 (a) and (b), two essential elements are required:

(1) A severance of goods from the mass of things belonging to this country, i.e., a carrying of the goods out of the country, and;

(2) An intention of uniting them with the mass of things belonging to some foreign country. See *Swan & Finch Co.* v. *United States*, 190 U.S. 143.

Under the facts cited, the distilled spirits were not exported for drawback purposes under sections 1313 (a) and (b).

Holding.—The transfer of distilled articles from a bonded Internal Revenue distilled spirits plant or export storage facility to a Customs bonded warehouse for storage pending exportation does not constitute exportation for drawback as required under sections 1313 (a) and (b), title 19, United States Code.

(C.S.D. 80-130)

Valuation: Whether Lubrication Fittings Are Finished Automobile Parts for Purposes of the Final List

Date: October 15, 1979
File: R:CV:V
061612 JV

To: District Director of Customs, Cleveland, Ohio.
From: Director, Classification and Value Division.
Subject: Internal Advice Request No. 188/79.

The subject of this request involves the question of whether lubrication fittings are covered by the final list (19 U.S.C. 1402) provision for "automobile parts, finished", and therefore subject to appraisement under the provisions of section 402a, Tariff Act of 1930, as amended.

It is the position of the inquirer that lubrication fittings are not dedicated for use with automobiles and since not classified as automobile parts under 692.27, Tariff Schedules of the United States (TSUS), should not be considered final list merchandise.

As you know, the final list study makes no reference to lubrication fittings. However, we have been able to determine that at the time the list was promulgated, such fittings were considered finished automobile parts. While it is recognized that lubrication fittings are capable of other uses, the final list, as its name implies, is final. There can be neither additions to it nor deletions therefrom, except by law. It is not an administrative compilation which Customs has the authority to amend. It can only be amended by Congress.

It is reasonable to assume that at the time the final list was promulgated, Congress knew that finished automobile parts could, at

some future time, be susceptible to other uses. Nevertheless, there does appear the specific enumeration for such parts. Therefore, since there can be no changes as regards the final list, except by law, we cannot offer an alternative to the present practice of appraising lubrication fittings under the provisions of section 402a.

We believe this to be consistent with Headquarters position in reply to internal advice request No. 12/76. We maintained that simply because the article under consideration (electric motor) was of greater technical sophistication than an electric motor, not over 75 horsepower, known at the time the final list was promulgated, did not preclude the article in question from the final list. Our conclusion was predicated on the assumption that Congress knew an electric motor, not over 75 horsepower, could be technically improved over the years and, hence, capable of other applications.

A distinction must be made between the classification of an article for tariff purposes and the determination as to whether an article is on the final list for appraisement purposes. The intent of the TSUS, the authority for which is contained in the Tariff Act of 1930, as amended, was to describe as completely as possible all imported articles for the assessment of duty. The intent of the final list, the authority for which is contained in section 6(a) Public Law 927, 84th Congress, was to itemize articles or classes of articles which, when appraised under the new valuation law (sec. 402), would result in a 5-percent or more decrease in valuation.

Keeping this distinction in mind, it should be noted that the language of a given listing on the final list does not necessarily bear a relationship to the classification of an imported article, although the same language may have been employed on the list and in the tariff schedules (C.S.D. 79–267). The terminology of the final list is much broader and general in nature than that of the schedules. Therefore, an article which is specifically provided for in the schedules (e.g., lubrication fittings) may be included under a more general category of the final list (e.g., automobile parts, finished). On the other hand, all items belonging to this general category of the list would not necessarily be classified under the specific provision of the TSUS. Accordingly, the fact that lubrication fittings are classified eo nomine under 680.57, TSUS, and not under the provision for automobile parts in 692.27, TSUS, is not determinative of their final list applicability.

Based on the foregoing, we conclude that lubrication fittings, regardless of use, are covered by the final list provision for automobile parts, finished, and therefore subject to appraisement under the provisions of section 402a.

(C.S.D. 80-131)

Carrier Control: Whether a Non-Coastwise-Qualified Tug May Engage in Berthing Operations Within a U.S. Harbor

Date: October 17, 1979
File: VES-10-03:R:CD:C
104220 JL

This is in reference to your letter of August 21, 1979, in which you ask for clarification of our ruling of August 15, file VES-10-03-R:CD:C 103910 TL.

You state that the Coast Guard informs that your client's tug which will be wholly owned by U.S. citizens may be entitled to U.S. documentation if it does not engage in coastwise trading. You note that our ruling of August 15, 1979, states that 46 U.S.C. 316(a) prohibits a tug from assisting American vessels to berth if the tug is not wholly owned by U.S. citizens within the meaning of 46 U.S.C. 802 and the tug does not have in force valid U.S. documentation. It is your opinion that assisting vessels to berth does not constitute transportation of merchandise or passengers for hire. You urge that inasmuch as the contemplated activity would not be between points in the United States but within one consolidated port of entry there would be no coastwise trade involved.

There were two holdings in our August 15, 1979 ruling, to wit:

1. A non-coastwise-qualified vessel cannot tow an American vessel from one point to another in a U.S. harbor unless the vessel is in distress, pursuant to 46 U.S.C. 316(a).
2. The activity of assisting vessels in berthing operations is "towing" within the meaning of section 316(a).

It follows then that a non-coastwise-qualified vessel (which an American documented vessel whose register carries a restrictive endorsement prohibiting engagement in coastwise trade is) is prohibited by 46 U.S.C. 316(a) from assisting vessels in bething operations within a U.S. harbor, unless the vessel is in distress.

While we do not address whether assisting vessels to berth constitutes transportation of merchandise or passengers, you will note that towing is the coastwise activity addressed in section 316(a), not the carriage of passengers or merchandise.

As to whether geographical points within one consolidated port of entry are points within the United States, we need only look to the clear language of the statute itself which prohibits the towing

> from any port or place in the United States, its territories or possessions, embraced within the coastwise laws of the United States, to any other port or place within the same, either directly or by way of a foreign port or place, or to do any part of such towing, or to tow any such vessel *from point to point within the harbor of such places.* [Italic supplied.]

(C.S.D. 80-132)

Drawback: Use of Low-to-High Basis for Identification for Drawback Under 19 CFR 22.4(f)

Date: October 17, 1979
File: DRA-1-09-R:CD:D B
210943

Issue.—Must a drawback claimant, holding an approved rate under 19 U.S.C. 1313(a), use the low-to-high designation principle set out in section 22.4(f), Customs Regulations, when currency fluctuations cause variances in dutiable values of like merchandise imported under different entries and commingled after importation?

Facts.—A drawback claimant holds an approved rate of drawback covering riflescope lenses under section 1313(a), title 19, United States Code. There is no difference in the unit values or rates of duty for each lens model. Therefore, the claimant wishes to list on the drawback entry only those import entries with model numbers corresponding to lens model numbers shown to have been used in the production of exported riflescopes. For example, if there were 100 model X lenses used in a particular production, the claimant believes it necessary only to identify a timely import entry covering model X lenses which could have been used in that particular production run. The rate of duty and the unit price for each particular model lens are the same for the past 2 years. However, because the claimant commingles like lenses, those customs officers believe that if the rate of exchange differs among entries, each drawback claim should list every entry covering those lenses upon which drawback is claimed, so that designation is made on a low-to-high basis as directed by section 22.4(f), Customs Regulations. The claimant states that this requirement will cause accounting problems and believes that 22.4(f) was not designed to cover currency fluctuation.

Law and analysis.—Section 22.4(f) of the regulations, requires in pertinent part:

> When identification is made against two or more lots of imported merchandise of different dutiable values or subject to different rates of duty, or against two or more lots of drawback products subject to different allowances of drawback, the drawback shall be based first upon the lot or lots of the lowest dutiable value, rate of duty, or drawback allowance, as the case may be, then upon the lot or lots of the next higher dutiable value, rate of duty or drawback allowance, and so on from lower to higher until all the lots have been accounted for * * *.

We assume that the imported lenses do not have individual serial numbers or other similar identification, but are identified only by

model number. The operateiv words in that portion of section 22.4(f) cited are: "* * * merchandise of different dutiable values" and "* * * until all the lots have been accounted for * * *".

No doubt, fluctuations in monetary exchange affect the values of imported merchandise for purposes of determination of duties. It would be virtually impossible to prepare section 22.4(f) of the regulations to specifically cover every possible situation whereby the dutiable value of merchandise is or can be affected. Suffice it to say that we have consistently held that the principle of section 22.4(f) can be applied in any case where dutiable values vary or different lots of drawback products are subject to different drawback allowances, no matter what the cause of the variance or difference.

In this case, though not apparent it is assumed that the unit prices for each model lens are stated by the supplier in foreign currency. Due to fluctuations of the dollar value abroad, the prices paid for the lenses in dollars will vary. When prices paid in dollars vary, it follows that the amount of duty paid, which determines the amount of drawback due, will also vary. This is the situation in the case under study, and it falls squarely within the principle of section 22.4(f) of the regulations. To account for merchandise of different dutiable values requires the listing on the drawback entry every timely entry covering a particular lens model which appears in exported riflescopes upon which drawback is claimed to protect against overpayment of drawback.

Holding.—When fungible goods which are subject to different dutiable values because of currency fluctuation are commingled, identification for drawback under 1313(a) must be made on a low-to high basis as set out in section 22.4(f), C.R. This requires listing on the drawback entry every consumption entry which covers merchandise which could have been used in the exported articles.

(C.S.D. 80–133)

American Selling Price: Whether Imported and Domestic Footwear Are Similar if Made in Dissimilar Widths

Date: October 17, 1979
File: CLA-2:R:CV:MA
061200 C

Re Decision on application for further review of protest No. 1001–9–000553.

Area Director of Customs,
New York, N.Y.

Dear Sir: This protest was filed against your decision in the liquidation on October 20, 1978, of entry No. 78/313084, covering a shipment of ladies footwear manufactured in Taiwan.

This ruling concerns the applicability of the American selling price basis of appraisement to certain ladies footwear.

Facts.—The ladies footwear involved is classifiable under the provision for other footwear which is over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics and having uppers of which not over 90 percent of the exterior surface area is rubber or plastics in item 700.60, Tariff Schedules of the United States (TSUS), and dutiable at the rate of 20 percent ad valorem.

Pursuant to schedule 7, part 1, subpart A, headnote 3(b), TSUS, this footwear was appraised on the American selling price of the domestically produced Oomphies "Original" which was $7 less 2 percent effective October 1, 1977.

The footwear involved was imported entirely in triple E widths. The protestant maintains that the ladies footwear in issue cannot be considered like or similar to the domestic prototype because the domestic prototype is not manufactured in triple E widths.

Issue.—Whether the imported footwear is legally similar to the domestic prototype for American selling price purposes.

Law and analysis.—For the purposes of determining similarity in American selling price cases, four tests have been used as guides: (1) Similarity of material, (2) commercial interchangeability, (3) adaptability to the same use, and (4) competitive character.

In order to be commercially interchangeable an article must be sold to the same class of purchasers as that which the domestic article is sold to. See *Mutual Supply Company* v. *United States*, 5 Cust. Ct. 614, R.D. 5062 (1940); *Albert F. Maurer & Company* v. *United States*, 47 Cust. Ct. 560, R.D. 10130 (1961); *A. Zerkowitz & Company* v. *United States*, 58 CCPA, 60, C.A.D. 1005 (1970). It is evident that an individual requiring a triple E width cannot substitute a shoe of narrower width for the triple E width.

The most important test in determining similarity in American selling price cases is the test of competitive character. Clearly, the imported shoes in triple E widths do not compete with the domestic prototype which is not produced in triple E widths.

Holding.—The ladies footwear in issue is not subject to appraisement on the American selling price of the domestically produced Oomphies "Original".

The protest should be allowed. Your file is returned.

(C.S.D. 80-134)

Entry: Special Manifest Procedure for Overcarried and Prematurely Discharged Merchandise

Date: October 18, 1979
File: ENT-1-01:R:E:E
306348 M
710814 M
711164 M

This ruling concerns the use of the special manifest procedure for overcarried merchandise and prematurely discharged merchandise.

Issue.—May overcarried merchandise or prematurely discharged merchandise transported to the manifested port under an immediate transportation entry, rather than under one of the two special manifest procedures, be included in the original entry summary filed at the manifested port?

Facts.—A district director of Customs, under the internal advice procedure, requests reconsideration of our letter of June 30, 1978, to him, and of legal determination 3550-06, which held that one of the two special manifest procedures mentioned in sections 4.34 and 18.10a of the Customs Regulations must be utilized for returning overcarried merchandise to the port of destination, if the importer wishes to include the overcarried merchandise in the original entry (now referred to as entry summary) and obtain the rate in effect applicable to the original entry summary. These two rulings applied to prematurely discharged merchandise as well.

Law and analysis.—19 U.S.C. 1315(a)(2), in pertinent part, reads as follows:

> Any article which is not subject to a quantitative or tariff-rate quota and which is covered by an entry for immediate transportation made at the port of original importation under section 1552 of this title, if entered for consumption at the port designated by the consignee, or his agent * * * shall be subject to the rate or rates in effect when the transportation entry was accepted at the port of original importation.

The District Director contends that the restriction concerning the use of the immediate transportation entry when filed at the port of original importation does not apply to overcarried merchandise because the immediate transportation entry would be filed at the port of discharge. In his opinion, the port of first importation for overcarried merchandise was the manifested port where the merchandise was carried, but inadvertently not discharged. In his opinion, the port of actual discharge is the second port of importation.

We find this interpretation of the port of original importation somewhat dubious. Moreover, the two rulings applied to prematurely discharged merchandise, as well as overcarried merchandise. Certainly even under the District Director's interpretation of the port of original importation, the port of actual discharge would be the port of original importation for prematurely discharged merchandise since such merchandise was discharged at a port before it ever reached the manifested port. Both overcarried merchandise and prematurely discharged merchandise have operationally been treated in the same manner because at the port of actual discharge it is often difficult to ascertain whether the merchandise was overcarried or prematurely discharged. Therefore, it would be confusing to permit an immediate transportation entry to be filed for returning overcarried merchandise to the manifested port for inclusion in the original entry summary and at the rate of duty applicable to the original entry summary and to refuse this privilege for prematurely discharged merchandise.

In addition, we conducted a survey of the nine Customs regions to ascertain their views in regard to requiring the use of one of the two special manifest procedures for returning overcarried or prematurely discharged merchandise to the manifested port if the importer wishes such merchandise to be included in the original entry summary and obtain the rate in effect applicable to the original entry summary. Such ruling was favorably received by the nine Customs regions.

A couple of the Customs regions, however, pointed out that because of the unfamiliarity of some of their Customs officials and some of the carriers in their region with the special manifest procedure mentioned in section 18.10a of the Customs Regulations, the carriers will often file an immediate transportation entry, when they meant to file a special manifest. If the District Director of Customs is satisfied that an immediate transportation entry was filed because of a clerical error, mistake of fact, or other inadvertence within the meaning of section 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)), and this error, etc. was timely brought to his attention, he may permit the substitution of a special manifest for the immediate transportation entry.

We do not believe that the ignorance of this procedure will be a problem in the future because we plan to revise section 18.10a of the Customs Regulations so as to clearly set out in detail this procedure. Presently, this procedure is only set forth in detail in Customs Circular TRA-7-EV dated September 17, 1963.

Holding.—In summary, our ruling is the following:

1. Merchandise, whether overcarried or prematurely discharged, may be included in an entry summary for consumption already filed at the manifested port and subject to the rates applicable to that entry

summary only if returned under one of the two special manifest procedures, either the special manifest procedure specified in section 4.34 of the Customs Regulations, or the other one mentioned in section 18.10 of the Customs Regulations and set forth in Customs Circular TRA-7-EV dated September 7, 1963.

2. If instead of the special manifest procedure, overcarried or prematurely discharged merchandise is returned to the manifested port under an immediate transportation entry, such action shall accord the returned merchandise the same status as any other arrival of merchandise under an immediate transportation entry, unless the District Director is satisfied that the filing of the immediate transportation entry was done because of a clerical error, mistake of fact, or other inadvertence within the meaning of section 520(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1520(c)(1)).

(C.S.D. 80-135)

Carrier Control: Foreign-Owned and Foreign-Registered Truck Tractor Hauling Truck Trailer Between Points in the United States

Date: October 19, 1979
File: BOR-7-04-R:CD:C
104251 DR

This ruling concerns the use of a foreign-owned and foreign-registered truck tractor in the local traffic of the United States.

Issue.—Whether a foreign-owned and foreign-registered truck tractor may legally haul a truck trailer solely between points within the United States.

Facts.—A foreign-owned and foreign-registered truck tractor hauls a similarly owned and registered truck trailer with merchandise for the United States from Mexico to the United States. After arrival in the United States, the tractor detaches the trailer and returns to Mexico, leaving the trailer in the United States. A second tractor, also foreign owned and foreign registered (same owner as the first tractor) takes the trailer in tow and hauls it to various U.S. destinations for unlading.

Law and analysis.—A foreign truck tractor which arrives in the United States in international traffic with a foreign truck trailer in its tow, either empty or loaded, is considered to constitute a foreign truck, as that term is used in section 123.14 (a), (b), and (c)(1), Customs Regulations. Such a rig may transport merchandise between points in the United States while on a regularly scheduled trip if such transportation is directly incidental to the international schedule.

A foreign truck tractor which arrives in the United States with an American trailer laden with merchandise for the United States, or arriving with an empty American trailer or with no trailer for the purpose of taking out merchandise, is considered to be arriving in international traffic and may be admitted without formal entry or the payment of duty but may not engage in local traffic. If it arrives with a foreign trailer it would be considered as part of a truck (as prescribed in the foregoing) and may therefore engage in local traffic only to the same extent and under the same conditions that a foreign truck may engage in local traffic (123.14(c)).

Holding.—A foreign truck tractor which arrives in and departs from the United States as an integral part of a truck may be used to transport merchandise when directly incidental to a regularly scheduled trip (123.14(c)(1)). Otherwise, it may not be used to transport merchandise between points in the United States if it has not been entered through Customs into the United States and all applicable duties paid thereon. Any vehicle used in violation of the regulations shall be subject to forfeiture under the provisions of title 19, United States Code, section 1592 (123.14(d)).

(C.S.D. 80–136)

Vessels: Prohibition Against Gambling Devices on Board U.S.-Flag Vessel in International Waters

Date: October 19, 1979
File: VES–5–10–R:CD:C
104258 DR
104086

This ruling concerns the possession and use of gambling devices on American vessels.

Issue.—Whether gambling devices such as slot machines are permitted on board U.S.-flag vessel to be operated when the vessel is in international waters.

Law and analysis.—Section 5 of the act of January 2, 1951 (15 U.S.C. 1175), prohibits the use or possession of gambling devices within "the special maritime and territorial jurisdiction of the United States as defined in section 7 of title 18 of the United States Code." Section 7 defines "special maritime and territorial jurisdiction of the United States" as including "the high seas, * * * and any vessel * * * when such vessel is within the admiralty and maritime jurisdiction of the United States * * *."

American flag vessels are considered as being within the admiralty and maritime jurisdiction of the United States, whether on the high

seas or within territorial waters of a foreign country (*U.S.* v. *Flores*, 289 U.S. 137 (1933)).

Section 1(a) of the Act (15 U.S.C. 1171(a)) defines the term "gambling device" to mean:

> (1) Any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, * * *.
>
> (2) Any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, * * *.

Holding.—It is unlawful to possess or use any gambling devices, such as slot machines, on board a U.S.-flag vessel in international waters, pursuant to section 1175 of title 15, and section 7 of title 18, United States Code.

(C.S.D. 80–137)

Drawback: Whether Drawback is Allowable on Valuable Waste Incurred in Manufacture

Date: October 22, 1979
File: DRA-1-R:CD:D NK 210988

Issue.—Whether drawback is allowable on the exportation of valuable waste incurred in the manufacture of an article.

Facts.—A manufacturer proposes to import steel slabs for use in the manufacture of rolled coils. The manufactured coils will not be exported but will be used in domestic consumption. However, the manufacturer wants to claim drawback on the exportation of a valuable waste byproduct which results from the manufacturing process for the coils.

Law and analysis.—The drawback law under section 1313(a), title 19, United States Code, and applicable regulations, authorizes the payment of drawback upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise.

Some manufacturing processes result in the manufacture not only of the principal product but also one or more byproducts. An example of multiple byproducts is the processing of linseed to obtain linseed oil which results in the byproduct linseed cake. Drawback is allowable on exportation, in accordance with applicable regulations, of either the manufactured linseed oil or cake or both. This is because the drawback law also provides that "the drawback shall be distributed to the several products in accordance with their relative values at the time of separation."

However, waste is the residue or leftover merchandise incurred in the manufacture of something else rather than an article manufactured. Therefore, drawback is allowable on exports of byproducts, but not on exports of valuable wastes.

In the decision of the Customs Court in *Burgess Battery Co.* v. *United States*, 13 Cust. Ct. 37 (1944), the court considered a manufacturing process similar to the facts described above. American-made zinc sheets were exported to Canada and used in the manufacture of battery cups. Leftover trimmings of zinc referred to as "line scrap" was returned to the United States and claimed to be free of duty as American goods returned. The court upheld this claim because the residue line scrap was produced by a "process of segregation or elimination" rather than by a "process of manufacture or other means."

Although the decision in the court case concerned another provision of law, the manufacturing process described indirectly supports the Customs position that drawback is not allowable on exports of valuable waste. Under the facts presented in the present case, the waste is the residue from steel slabs used to manufacture something else (rolled coils) rather than an article manufactured.

The manufacturing requirement of the drawback law is not satisfied merely because residue waste has value. Accordingly, section 22.4(a) of the Customs Regulations provides, in part, that when recovered waste has a value and the drawback claim has not been limited to the quantity of imported duty paid merchandise appearing in the exported articles, the records kept by the manufacturer shall show the factor value of the imported duty-paid merchandise used and the factory value of waste in order that in the liquidation of the drawback entry the quantity of the imported duty-paid merchandise used may be reduced by the quantity thereof which the value of the waste will replace. This procedure was first brought into the Customs Regulations in 1937 and was in use for an indeterminate period prior thereto.

Holding.—Drawback is not allowable on exportation of valuable waste.

(C.S.D. 80-138)

Entry: Waiver of Production of Missing Documents by Liquidation of Entry

Date: October 22, 1979
File: ENT-1-01 R:E:E
711059 MK
711310 MK

This ruling concerns the question of liability under an entry bond

324-903 O - 80 - 5

for a missing document when the entry has been liquidated, and the question of when general liability under the entry bond is terminated.

Facts.—On occasion a customhouse broker posts a bond for a missing document, and the entry is liquidated prior to receipt of that document.

Issues.—(1) Does liquidation of the entry constitute a waiver of the production of the document and terminate liablility under the bond for its production?

(2) Does liability under an entry bond continue after an entry is liquidated?

Law and analysis.—Most missing documents are required in order to accurately classify and appraise the merchandise. Presumably, in the absence of such documents, the Customs officer who liquidates the entry resolves the classification or appraisement questions in favor of the Government, to protect the revenue. Thus, no purpose would be served in producing such documents after liquidation, insofar as Customs is concerned, and liquidation of the entry would constitute a waiver of the production of documents relating to classification or appraisement. It follows that liability on the entry bond for production of such missing documents would be terminated upon liquidation of the entry.

Customs terminates liability on an entry bond after expiration of the 2-year period set in section 521, Tariff Act of 1930, as amended (19 U.S.C. 1521). Under 19 U.S.C. 1521 an entry may be reliquidated within 2 years after the date of liquidation or last reliquidation if a Customs officer finds probable cause to believe that fraud is involved in the entry. The Customs Service considers the time limit set by 19 U.S.C. 1521 to be the last practical date of bond liability for duty due.

After expiration of that period, future bond liability is terminated. Of course, under section 113.3, Customs Regulations (19 CFR 113.3), the principal and surety on a terminated bond remain liable for any default that occurred before termination.

Therefore, during this period, Customs can enforce a demand for redelivery, which can generally be issued at any time before liquidation of the entry becomes final, under section 141.113, Customs Regulations (19 CFR 141.113). Bond liability during this period also continues for the production of missing documents required by other Government agencies whose laws or regulations Customs enforces.

Holding.—The liquidation of an entry constitutes a waiver for the production of a missing document relating to classification or appraisement of the merchandise, and terminates liability under the entry bond for production of such document. General liability on an entry

bond terminates after expiration of the 2-year period est in section 521, Tariff Act of 1930, as amended (19 U.S.C. 1521).

(C.S.D. 80-139)

Constructed Value: Validity of Cost of Materials in Absence of Contradictory Evidence

Date: April 14, 1980
File: CLA-2-RRUCV JV
061975

Re Decision on application for further review of protest No. 1001-8-015095, dated December 27, 1978.

AREA DIRECTOR OF CUSTOMS,
J. F. K. Airport,
Jamaica, N.Y.

DEAR SIR: This decision concerns the proper appraised values for certain linen goods imported from the Azores Islands. The merchandise was appraised and liquidated on the basis of its constructed value (sec. 402(d), Tariff Act of 1930, as amended), at the invoice price plus 12 percent to account for a change in the cost of materials between the time such materials were ordered and the time of manufacture and exportation of the final products to the United States.

Issue.—Whether the 12-percent advance over the entered values to account for a change in the cost of materials during the above passage of time due primarily to currency fluctuations is proper under statutory constructed value. The basis of appraisement is not in dispute.

Facts.—The operation in the Azores is a cut, make, and trim operation. Large bolts of raw fabric are purchased by the importer from a Czechoslovakian firm. Production of the fabric in that country is extremely slow and a single order is often filled by means of several shipments over the course of several months. Thus, in order to insure that the manufacturer of the imported linens will have suitable fabric by the time the production process is to commence, the importer must place orders with the fabric producer no later than 6 to 12 months in advance of the commencement of the operation in the Azores. Consequently, several months will pass between the time the fabric is ordered and the time the final products are manufactured and exported to the United States. The protestant contends that the proper basis for establishing the cost of materials is to take the actual price paid for the fabric, since that price represents the price at which suit-

able fabric could last have been purchased so that the purchase could be delivered by the time of commencing manufacture of the imported merchandise in the normal course of business.

Law and analysis.—Section 402(d)(1) provides for the cost of materials and fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement, which would ordinarily permit the production of that particular merchandise in the ordinary course of business.

The Court of Customs and Patent Appeals in the case of *Charles Stockheimer et al.* v. *United States*, 44 CCPA 92, C.A.D. 642 (1957), held that cost of materials under the cost of production formula is to be ascertained as of the time when such materials were or could have been purchased for the manufacture of the imported merchandise. Thus, the cost is fixed with respect to a definite time, that is, at or prior to the date of manufacture of the imported merchandise. The court went on to state, at page 96,

> that this would necessarily entail ordering the materials at such a preceding time that they would be available long enough prior to the export date to permit manufacture in the normal manner.

This holding has since been extended to cover constructed value appraisements. See, for example, *Kaysons International Ltd.* v. *United States*, 66 Cust. Ct. 560, R.D. 11741 (1971).

It follows, therefore, that any increase by Customs in the value of the materials beyond the statutorily defined point in time due to currency fluctuation, inflation or other market forces would, as a matter of law, be erroneous. The Customs Court has recently ruled unfavorably with regard to Customs double conversion practices in connection with imported merchandise invoiced in dollars. In *C.B.S. Imports Corp.* v. *United States*, C.D. 4739 (1978), the court rejected the Customs Service's decision to convert the dollar value of merchandise into foreign currency at the rates which prevailed on the date of contract and to later reconvert the foreign currency into dollars at the rate prevailing on the date of exportation. When merchandise is invoiced in dollars, the price at which such or similar merchandise is sold does not change simply because of a rise or fall in the value of the dollar. In fact, the court found that a change in currency exchange rates does not automatically affect prices. Other factors, such as competition, economic conditions, and the nature of the merchandise itself all must be considered. Thus, it is clear that any presumptions that currency fluctuations or revaluations automatically increase prices and costs is erroneous.

While that case involved merchandise appraised on the basis of statutory export value, we believe that these same principles govern

in determining cost of materials under constructed value. In the instant case the price for the fabric is the invoice price as shown in the supplier's invoices. There is nothing in the record to suggest that this price is not reflective of the cost of the fabric on the last day on which it could have been purchased for use in the production of the imported merchandise in the ordinary course of business. Consequently, it is this price which is the proper basis for establishing the cost of materials under section 402(d).

On the question of proof, the Customs Court in *Kaysons, supra*, at page 566, declared that "it is insufficient for defendant (Government) to merely allege that the time at which the cost of materials was taken was inappropriate." In other words, where the importer comes forward with proof (e.g., supplier's invoices) regarding the cost of materials used in a transaction, the Customs Service should accept that cost for constructed value purposes unless there is information to the contrary.

Holding.—It is improper for Customs to increase the cost of materials under constructed value due to currency revaluation or other factors where the proofs establish that the actual price paid for those materials represents the price preceding the date of exportation of the merchandise undergoing appraisement, which would ordinarily permit the production of that particular merchandise in the ordinary course of business.

(C.S.D. 80-140)

Classification: Angel Figure Christmas Tree Ornament

Date: November 6, 1979
File: CLA-2:R:CV:MA
061500 c

Re Decision on application for further review of protest No. 4501-7-000065.

This protest was filed on September 22, 1977, against your decision in the liquidation on July 29, 1977, on entry No. 108509, dated June 13, 1977.

This ruling concerns the classification of an angel figure Christmas tree ornament.

Facts.—The merchandise, a product of Hong Kong, consists of a figure of an angel which appears to be a Christmas tree ornament. The figure stands about 4 inches high and is made of molded plastic. It has large wings, a halo, and a metal eyelet implanted in the halo. No feet or legs are visible because the angel's gown conceals the entire

lower half of the body. At the bottom of the gown are printed the words "Joy to the World" and "1977".

Issue.—Whether the angel figure is classifiable under the provision for dolls, in item 737.20 (currently 737.22), Tariff Schedules of the United States (TSUS), or is classifiable under the provision for Christmas tree ornaments of plastics, in item 772.95, TSUS.

Law and analysis.—The term "dolls" has been judicially construed to include those articles: (1) Similar to dolls used as children's playthings; (2) used for ornamental purposes; and/or (3) commonly referred to in the trade and commerce of the United States as dolls.

An examination of the sample shows that although it is made of plastic, it has the sculptured ceramic look typically associated with Hummel figurines.

The sample is not used as a child's plaything or for ornamental purposes. It is not known as a doll in the trade and commerce of the United States.

Holding.—The sample is classifiable under the provision for Christmas tree ornaments of plastics, in item 772.95, TSUS.

(C.S.D. 80–141)

Classification: Knit Textile Fabrics With Cut Pile Yarns

Date: December 4, 1979
File: CLA-2:R:CV:MC
055079 PR

Re: Decision on application for further review of protest No. 27047001245.

This protest is against your decision in the liquidation on May 6, 1977, of entry No. 915546, dated July 7, 1976, and entry No. 935213, dated September 3, 1976. Both entries concern the classification of certain knit textile fabrics.

Issue.—The merchandise is claimed to be classifiable under the provision for knit fabrics of manmade fibers, in item 345.50, Tariff Schedules of the United States (TSUS), with duty at the rate of 25 cents per pound plus 20 ad valorem. It was classified under the provision for pile fabrics of manmade fibers, in item 346.60, TSUS, with duty at the rate of 15 cents per pound plus 25 percent ad valorem.

The importer's representative has advanced two reasons for the merchandise to be classifiable under the provisions for knit fabrics. The first basis is that the merchandise is the same merchandise which has previously been ruled by the Customs Service to be classifiable in item 345.50, TSUS. The second basis is that the merchandise is, in

fact, a napped fabric and not a pile fabric. Thus, the issue presented is not only a question of fact, but also of the applicability of a prior Customs Service ruling.

Facts.—On August 12, 1976, Headquarters, U.S. Customs Service, responded to internal advice request No. 36/76, 044860, dated August 12, 1976, which concerned the tariff classification of certain warp knit fabrics. The fabrics which were the subject of that ruling were described as warp knits of a tricot construction with floats of various lengths. The floats were stated to be uncut. A pile-like surface effect was produced on the fabric by mechanical finishing.

The basis for the description contained in I.A. 36/76 is a memorandum from a Customs Service laboratory to the national import specialist. That memorandum contained the following description of the samples.

> Samples A through H are two bar fabrics which have either a loop raised, a locknit, or a satin construction. In each, the back bar produces a single bar construction, while the front produces underlaps over a minimum of two needle spaces. These underlaps form floats which are on the technical back of the fabrics. Since the back bar produces a single bar fabric, the fabric will remain intact if the front bar were removed. Therefore, we are of the opinion that these samples are pile fabrics in which the pile was inserted during the knitting.

That memorandum was written prior to the decision in *Tilton Textile Corp.* v. *United States*, 77 Cust. Ct. 27, C.D. 4670 (1976), *aff'd* 65 CCPA 18 C.A.D. 1199 (1977), which ruled that in order to be classifiable as a pile fabric, the fabric must either have a raised pile projecting from the surface of that fabric or not have any commercial use other than to be made into a pile fabric. This is contrary to the practice which Customs had before *Tilton* of classifying certain uncut fabrics, such as uncut corduroys and uncut velvets, as unfinished pile fabrics.

When the subject protest file reached headquarters, no samples were included. In an effort to obtain samples, it was discovered that the Customs laboratory in Los Angeles had retained samples from the shipments involved. To determine the correctness of the assertion that the instant merchandise is the same merchandise as that which was the subject of our ruling in I.A. 36/76, the samples which were retained in that internal advice file were forwarded to the Los Angeles laboratory for comparison with their retained samples. The examination by the Los Angeles laboratory revealed that of the samples labeled A through H, all were tricot knit fabrics with pile yarns inserted, and that five did not have the pile yarns cut while three did have the pile yarns cut. The merchandise which is the subject of the instant protest was determined to be the same as the three samples of fabrics which had their pile (float) yarns cut. With this information in hand, mem-

bers of the Classification and Value Division of this headquarters reexamined the samples and the accuracy of the examination by the Los Angeles laboratory was readily apparent.

Law, analysis and holding.—Based on the laboratory examination and our own observation of swatches of the imported fabric, it is apparent that the float yarns on the imported merchandise have been cut, creating pile fabrics. However, such a conclusion is not dispositive of the protest since the Customs Service, in I.A. 36/76, apparently classified the same fabrics under the provisions for knit fabrics.

I.A. 36/76 specifically held that such fabrics were not pile fabrics. In view of that holding and the fact that the merchandise which was the subject of I.A. 36/76 was manufactured by the same company as the merchandise which is the subject of the instant protest, the Customs Service believes that its own mistake of fact should not prejudice the rights of the parties which were directly involved with I.A. 36/76. Accordingly, you are hereby directed to grant the instant protest.

Effect on prior rulings.—The Customs Service ruling on the request for internal advice, No. 36/76, dated August 12, 1976, file 044860, which has now been determined to be predicated on inaccurate information, is hereby modified to reflect the information contained above and that fabrics as represented by the swatches which have cut float yarns (sample B, C, and E) are classifiable in item 346.60, TSUS. All entries made after the date of this ruling, covering the merchandise which was the subject of I.A. 36/76, will be classified in accordance with our response to that internal advice request, as modified by this ruling.

(C.S.D. 80-142)

Export Value: Section 402(b), Tariff Act of 1930, as Amended; Dutiability of Quota Charge

Date: December 11, 1979
File: R:CV:V RP
061510

To: Port Director of Customs, Atlanta, Ga.
From: Director, Classification and Value Division.
Subject: Request for internal advice No. 154/79, entry of certain wearing apparel from India.

Issue.—Where a foreign manufacturer-exporter is required to invoice the merchandise in question at a price higher than the original contract price in order to secure the necessary quota from the foreign government, which price, if any, represents export value under section 402(b), Tariff Act of 1930, as amended?

Facts.—The subject of the above-referenced request for internal advice concerns importations of wearing apparel from India.

It appears that the Indian Government has adopted a quota allocation system under which the Government sets certain price levels for obtaining quota and has reserved significant portions of the quota for wearing apparel at prices in excess of Government-set levels. The importer in question has contracted with the foreign manufacturers and exporters to buy the subject merchandise at prices which are often below the Government-set level for obtaining quota. In order to obtain the necessary quota, the exporters have been forced to raise the unit price of the wearing apparel to the Government level. Therefore, the higher prices which appear on commercial invoices do not, in most instances, accurately reflect the lower contract selling prices.

It is the position of the importer that the actual contract price represents the export value of the wearing apparel, rather than the higher invoice price used by the manufacturer to secure quota. It is contended that the amount by which the invoice price exceeds the contract price represents the amount which is refunded or rebated to the importer by the foreign manufacturer-exporter.

Due to strict currency controls imposed by the Government of India, the rebating is accomplished by reducing the invoice prices of styles not subject to the quota price system below the contract prices originally negotiated between the parties, or by rebating amounts to the importer's agent.

Law and analysis.—In *United States* v. *Getz Bros. & Co., et. al.*, 55 CCPA 11, the Court of Customs and Patent Appeals considered the question of whether Japanese quota restrictions on the exportation of plywood affected the dutiable value of the merchandise. The court stated:

> Such charges for a quota, which sometimes occurred, formed no part of purchase price of the plywood for export, nor did it, in our view, within the statute, form any part of the cost, charges and expenses incident to placing the merchandise in condition packed ready for shipment to the United States. Such quota charges or premiums clearly occurred after the goods had achieved this status.

In two previous rulings (internal advice No. 138/76 and ORR letter ruling 74-400266), headquarters clarified its position in light of *Getz* and held that the quota charge is not dutiable even where the expense of paying the quota charge is actually passed on to the importer and is part of his cost of obtaining the goods, so long as the manufacturer freely offers the merchandise at a price which does not include a quota charge when such charge is not incurred by him.

324-903 O - 80 - 6

The existence of a quota limitation does not defeat the requirement of a freely offered price, since there is no arbitrary exclusion of certain purchasers or classes of purchasers from buying from the seller. *United States* v. *Getz, Bros. & Co., et al., supra.*

We note, however, that when a manufacturer sells merchandise subject to quota without having expended his quota allotment, yet passes a quota charge on to the importer, that charge is dutiable. In such a case, the merchandise is not freely offered to everyone at a price that does not include the quota charge.

In the case before us, the record indicates that the foreign supplier is not passing on a quota charge to the importer without having expended his quota allotment. It appears that the merchandise is offered for sale at prices which do not include the quota charge.

Holding.—Therefore, we are in agreement with the Chief, Duty Assessment Branch, New York Seaport, that in this particular case, the quota charge does not form part of dutiable value, and that the actual lower contract selling price represents export value, rather than the higher quota price which the importer was obligated to pay in assisting the foreign supplier to acquire the necessary quota.

It should be noted that in those instances where a rebate is paid to the importer by means of price reductions for other merchandise to be imported into the United States, it is incumbent upon the importer, at the time of entry of this other merchandise, to inform Customs of the rebated amounts and the corresponding reduction in prices. Failure to disclose all elements of value regarding the transactions may result in the initiation of penalty proceedings.

(C.S.D. 80–143)

Vessel Repairs: Dutiability of Expenses in Construction of One Vessel from Midbody of Another Vessel; 19 U.S.C. 1466

Date: December 12, 1979
File: VES–13–18–RRUCDC
104319 JM

Your letter dated October 19, 1979 (VES–13–18–0:C:L: BA 1j), requested a ruling on a petition filed under section 4.14(k), Customs Regulations, for relief from duty under 19 U.S.C. 1466, on the cost of repairs to the (vessel No. 2), vessel repair entry No. 171819, dated April 5, 1979.

The record shows that the (vessel No. 1) was sold to (foreign company), Kobe, Japan; that the vessel's document was surrendered; that the bow and stem were removed and scrapped; that the midbody

was used in the construction of the (vessel No. 2), and that a new official number was issued to the resulting vessel by the U.S. Coast Guard. The Coast Guard has informed us that the (vessel No. 2), official No. 594073, was built in 1978, in Japan; that the vessel was issued Permanent Register 35 on June 13, 1978; and that its home port is listed as Wilmington, Del. (Person's name) of (domestic company) has informed us that the first arrival of the (vessel No. 2) in the United States was on April 5, 1979.

Vessel repair entry No. 171819 covers foreign repairs to the vessel between the date it was documented as a vessel of the United States and the date the vessel first entered the United States. In a letter dated July 26, 1979, you furnished (domestic company) a copy of Customs form 226 with notations to reflect the tentative liquidation of this entry. By letters dated September 28 and October 1, 1979 (domestic company), requested review of your decision as provided by section 4.14(k), Customs Regulations.

We have reviewed the entire file on this matter and agree with your proposed liquidation with the exception of items as listed in comments below:

Comment 1

Items 9, 10, and 11 cover labor and/or crane service to either lade or to devan and distribute ships stores and parts removed from the former (vessel No. 1).

Item 259 covers labor and crane service to lade, devan, and store five vans containing stewards stores and lashing gears from sources other than the former vessel.

Item 78 covers labor and forklift to devan and lade miscellaneous parts from three containers.

Item 17 covers labor and a forklift truck for devaning/stuffing work to make inventory prior to sending articles to Oakland.

Item 67 covers labor for carrying ships stores (food and provisions) from a container to the ship.

The above items are considered in the nature of transportation charges. Other items which cover transportation charges are item 12 (drying of vans between PC–1 and MHI) and item 111, which has launch hire shown as a separate charge.

In CIE 970/60 we followed the ruling of the Customs Court (C.D. 1836) which held that the cost of transportation of workers and materials is not subject to duty under the vessel repair statute. Accordingly, the transportation charges as stated in the preceding paragraph, including hire shown as a separate charge on the invoice for item 111, are not costs of repairs and are not subject to duty under 19 U.S.C. 1466.

We note that item 42 covers the delivery of an accumulator cylinder which would appear to be in the nature of transportation charges. Since the invoice covering this item is in Japanese and we are unable to separate dutiable and nondutiable charges, we agree with your liquidating this item as dutiable.

Comment 2

Item 14 covers labor and material for a rack for crane parts.

Item 59 covers labor and materials to construct a shelf and metal cage.

Item 62 covers construction of television stand in officers' room.

Item 63 covers the construction of steel work benches.

Item 64 covers installation of lug-type pad-eye to be welded to hatch cover and regular type pad-eye welded to hatch coaming.

The above items appear to be permanent additions or fittings to the hull of the vessel rather than equipment of or repairs to the vessel.

In an opinion of the Attorney General, which quoted the Naval Board of Construction, the term "equipment" of a vessel was defined as "any portable thing that is used for, or provided in, preparing a vessel, whose hull is already finished, for service" (27 O.A.G. 228 (1909)). That opinion went on to say that the term "addition to the hull" or "fittings to the hull" (in contradistinction to "equipment," or "repairs") is any permanent thing attached to the hull which would remain on board were the vessel to be laid up for a long period.

Acting on a similar matter in *United States* v. *Admiral Orient Line*, 19 C.C.P.A. 137 (1930), the Court of Customs and Patent Appeals held that the installation of swimming tanks on a vessel was an alteration and therefore not subject to the provisions of section 1466. In *Otte* v. *United States*, 7 C.C.P.A. 166 (1916), the Court of Customs and Patent Appeals held that two elements must be present in order that an article may be regarded as an addition or fitting to the hull, rather than merely equipment of or repairs to the vessel. The two elements are that the article be permanent and that the article be essential to the successful operation of the vessel.

We believe items 14, 59, 62, 63, and 64 are permanent additions or fittings to the hull of the vessel and thus not dutiable under 19 U.S.C. 1466.

Comment 3

Items 24, 43, 57, 77 cover charges for chemical analysis of fuel oil supplied to the vessel.

Item 15 covers oil boom-deployment/recovery/oil fence. (A job order dated July 23, 1978, and other documents in the background file indicate this item covers an oil boom deployed around the vessel while bunkering).

The above items are a part of the vessel's fuel costs not related to repairs and as such are not subject to duty under 19 U.S.C. 1466.

Comment 4

Item 32 covers the purchase of 40 gallons of Gamlem Electrical Solvent for cleaning bilge. There is no evidence that this solvent was purchased for use in effecting repairs.

In C.I.E. 196/60, we held that sulphuric acid "purchased to be used by the crew in order to remove scales from the evaporator of the vessel" constituted a consumable supply, and accordingly not subject to duty under the vessel repair statute.

We believe item 32 is a consumable supply not subject to duty under 19 U.S.C. 1466.

Comment 5

Item 18 covers a sanitary inspection fee for radio pratique paid to Yokohama Quarantine Office.

Items 44 and 70 cover condition surveys by the American Bureau of Shipping. Documents in the file indicate pistons were pulled for condition survey.

In C.S.D. 79-278, published in the CUSTOMS BULLETIN (vol. 13, No. 32) on August 8, 1979, we stated:

> Where a survey is undertaken to meet the specific requirements of a governmental entity, classification society, insurance carrier, etc., the cost is not dutiable even when dutiable repairs are effected as a result thereof. Where an inspection or survey is conducted merely to ascertain the extent of damages sustained or where repairs are deemed necessary, the costs are dutiable as part of the repairs which are accomplished per the holding in CIE 429/61.

It appears the above inspections/surveys were undertaken to meet the specific requirements of a governmental entity or classification society and are not dutiable.

Comment 6

Items 83 through 95 and items 118 through 254 are shown on the vessel repair entry as "Guarantee Work—No Cost Items." The petitioner claims these items come under the 12-month warranty period for the new vessel, that the repairs were made without charge, and that these items are not dutiable.

ORR Ruling 23-69 held in relevant part as follows:

> In the case of a new vessel on its first voyage, it is reasonable to assume that new equipment covered by a warranty is seaworthy for a round voyage, foreign and return. Unless the evidence indicates some other cause, failure of such equipment may be considered a casualty within the meaning of section 258(1).

The legislative intent of the 50 percent ad valorem duty under 19 U.S.C. 1466 on the cost of ship repairs made in foreign countries

is to protect American shipyards and the American manufacturer of ship parts. (33 O.A.G. 432 (1923)). In determining that the repairs discussed in ORR Ruling 23–69 were necessitated by a casualty within the meaning of the vessel repair statute, we found that the vessel was built in the United States, that the equipment concerned was new and covered by a warranty and that the vessel was on its first voyage. In another decision, abstracted in T.D. 71–83, we broadened the one-round voyage rule to cover parts of a vessel which have been repaired and/or serviced just prior to a voyage from a U.S. port * * *.

We believe an essential element of the one-round voyage rule is the fact that the vessel was built in the United States if a new vessel on its first voyage or, if other than a new vessel, that the vessel was repaired and/or serviced in the United States. To extend the "one-round voyage" rule to cover warranty items of a foreign shipyard would be contrary to the purpose of the statute, i.e., protection of American shipyards and the manufacturer of American parts.

Since the vessel was subject to the statute and no further relief is provided for therein, remission of duty on items 83 through 95 and items 118 through 254 is denied.

Item 132 covers transportation expenses and is not subject to duty for the reasons stated in comment 1 above.

(C.S.D. 80–144)

Marking: Acceptability of UK as Country-of-Origin Marking on Product Made in England

Date: December 12, 1979
File: MAR-2-05-RRUEE
711829 HS

Internal Advice Request No. 195/79 was initiated by (name of company). It involves the marking of certain gas pressure cylinders that are manufactured in England.

Issue.—(1) Whether the abbreviation UK located between other letters and numbers as part of a code that is die stamped on the cylinders is a sufficient indication of England as the country of origin to meet marking requirements.

(2) If not, whether the cylinders may be excepted from marking under the provisions of either section 304(a)(3) (G) or (H), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)(3) (G) or (H)).

(3) Whether a district director has the authority to require that the cylinders be die stamped.

Facts.—Seamless steel cylinders which are intended to contain

gaseous materials under high pressure are manufactured in England and imported into the United States in empty condition. After importation the cylinders are sold by the importer to professional welders and other professional entities.

As imported, the cylinders bear a die stamped serial number required by the Department of Transportation (DOT). In this serial number, between other letters and numbers, appear the letters UK. No other marking appears. Upon the sale of the cylinders to a specific customer, each cylinder is final painted to that purchaser's specifications. Final painting would conceal or permanently obliterate any marking other than die stamping already on the cylinder.

Final painting cannot occur prior to importation. Because the customer is not known prior to the importation of the cylinders, the customer's final painting specifications cannot be known before importation. Also, severe paint damage would result to any cylinder which has been final painted prior to importation.

Each cylinder is required to be inspected by the DOT, and the report of the inspection is set forth on DOT form 5205A. The serial number required by the DOT is used to relate each cylinder to its inspection report on the form. DOT regulations require a copy of each completed report to be submitted by the DOT certifying inspector to the manufacturer, the purchaser and the Bureau of Explosives. While DOT regulations do not appear to require a copy of the inspection report to be provided to the ultimate purchasers of the cylinders, the importer, in this case, voluntarily provides each of his customers with a copy of complete inspection reports pertaining to the serially numbered cylinders which they have purchased. Each form 5205A identifies the country of origin of the cylinders as England.

Law and analysis.—(1) Section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), provides that articles of foreign origin imported into the United States be legibly and conspicuously marked to indicate the English name of the country of origin to an ultimate purchaser in the United States. The Secretary of the Treasury has the authority to determine whether certain words, phrases, or abbreviations will be acceptable as the English name. In ORR Ruling 74/0177, we have ruled that "Made in U.K." is an acceptable marking for a product made in England.

However, in this case the language "Made in" does not precede "UK" and "UK" is located between other letters and numbers. It would be difficult to associate UK in this context as standing for the country of origin. The intent of requiring only certain words, phrases, or abbreviations as country-of-origin marking is to insure that the marking will give the ultimate purchaser definite and reliable information as to the exact country of origin without the need for

speculation or interpretation (*American Burtonizing Co.* v. *United States* 13 Ct. Cust. Appls. 654).

Even if the marking in this case is understood by a particular industry, which consists of the ultimate purchasers of the cylinders, by interpreting a code, the marking would not meet the purpose of the marking requirements to give definite information without the need for interpretation.

Obviously, providing a copy of DOT form 5205A to an ultimate purchaser when a cylinder is sold does not meet the marking requirements as the DOT form is neither part of the cylinder itself nor permantly attached to the cylinder.

(2) The petition seeks an exception from the marking requirements on two bases. First, exception is sought under 19 U.S.C. 1304(a)(3)(G) and section 134.32(g), Customs Regulations, which allow an exception for articles that are to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any mark would necessarily be obliterated, destroyed, or permanently concealed.

Section 134.36(a), Customs Regulations, states that this exception will not apply if there is a reasonable method of marking which will not be obliterated, destroyed, or permanently concealed by such processing.

The petitioner contends that the exception in this case is not precluded by section 134.36(a). He contends that apart from die stamping there is no other reasonable method of marking * * *. We are of the opinion that section 134.36(a) does preclude the 19 U.S.C. 1304(a)(3)(G) exception. That section clearly states that the exception would be granted if any mark contemplated by this section would necessarily be obliterated, destroyed, or permanently concealed. Die sinking, certainly a mark contemplated by the marking laws and regulations, as it is specifically suggested in section 134.41, Customs Regulations, for marking metal articles, would not be concealed by final painting, as evidenced by the fact that the code which was die stamped on the cylinders prior to final painting is not concealed by the painting.

The other exception that the petitioner seeks is that set forth in 19 U.S.C. 1304(a)(3)(H) and section 134.32(h), Customs Regulations. Under this exception, marking would not be required if an utlimate purchaser, by reason of the character of such article of by reason of the circumstances of its importation, necessarily knows the country of origin of such article even though it is not marked to indicate its origin.

The petitioner contends that the ultimate purchasers are specifically knowledgeable with respect to the meaning of the coding and must, therefore, necessarily know the country of origin of their cylinders.

The petitioner also states that the DOT inspector's reports that accompany the cylinders contain the name of the country of origin of the cylinders and that this document is in fact reviewed by the purchaser.

Even if we accepted these contentions, they would not be determinative of whether a 19 U.S.C. 1304(a)(3)(H) exception would be granted. It has been Customs policy generally to only grant such exceptions when there is a two party one-step transaction between an importer and his foreign supplier with the importer also being the ultimate purchaser (*U.S. Wolfson Bros.* v. *United States* 52 Cust. Ct. 86). Direct contact between the purchaser and manufacturer insuring that the order will be filled only with articles manufactured in a named country is also generally required.

In this case, the ultimate purchasers and the importer are not the same party, and there is no direct contact between ultimate purchasers and the manufacturer. There is also no assurance that the cylinders will only be manufactured in England; in fact, cylinders similar to the ones in question are manufactured in many foreign countries. Accordingly, an exception from marking cannot be granted for the cylinders under 19 U.S.C. 1304(a)(3)(H).

(3) The petitioner's final argument is that 19 U.S.C. 1304 and part 134, Customs Regulations, do not authorize the district director's requirement that the cylinders be marked by die stamping.

The petitioner bases his argument on sections 134.41 and 134.42 of the Customs Regulations. Section 134.41 states that definite methods of marking are prescribed only for articles provided for in 134.43 and for articles which are the object of special rulings by the Commissioner of Customs. Section 134.42 provides that marking merchandise by specific methods may be required by the Commissioner of Customs, and that notices of such rulings shall be published in the Federal Register and the CUSTOMS BULLETIN.

It is our opinion that these sections do not preclude Customs from requiring a definite method of marking for a specific article when the method is the only way that the country of origin may be marked on the article legibly, indelibly, and permanently. Section 134.41 precludes Customs from prescribing a definite method of marking only when other methods would meet the statutory requirements.

The petitioner, in this case, admits that die stamping is the only method of marking that will legibly and indelibly remain on the cylinders after final painting. As we have established in the discussion of the second issue that die stamping is a reasonable method of marking, it is our opinion that the district may require die stamping in this case.

Holding.—The abbreviation UK, located between other letters

and numbers as part of a code that is die stamped on cylinders, is not sufficient indication of England as the country of origin as it requires interpretation by the ultimate pruchasers. The cylinders may not be excepted from marking under 19 U.S.C. 1304(a)(3)(G), as die stamping is a mark contemplated by the marking requirements, and would not be concealed by further processing performed in the United States. The cylinders also are not excepted from marking under 19 U.S.C. 1304(a)(3)(H), as the ultimate purchasers do not have direct contact with the cylinder's manufacturer insuring that the cylinders will be manufactured only in England and there is a third party involved in the transaction other than the manufacturer and importer/purchaser. Finally the district director has the authority to require the cylinders to be die stamped because die stamping is the only reasonable method of marking which will meet country of origin marking requirements.

(C.S.D. 80-145)

Classification: Trademark Labels, Edging, Belt Loops, and Patch Pockets on Cotton Jeans; Ornamentation

Date: December 13, 1979
File: CLA-2:R:CV:MC
061646 BB

This ruling is in response to request for internal advice No. 212/79 concerning the classification of cotton jeans (your reference S:C: DVIII-75-570).

Facts.—Two samples are submitted. Style 98902 is a pair of jeans stated to be of 100-percent cotton. The jeans have a fly front with zippered snap closure, six belt loops, two front slash pockets, a coin pocket above the right front slash pocket and two rear patch pockets. A label of simulated leather, bearing a likeness of the skull of a long-horn steer and the words (designation), in script lettering, has been attached at the waistband.

A metal label, approximately 1¾ inches by ¼ inch in size, bearing the words (designation) in plain block lettering, has been riveted to the upper right hand corner of the right rear patch pocket. The label has been shellacked to create an antique gold finish. A narrow folded strip of contrasting material has been sewn along the top of the coin pocket in such a way that approximately one-fourth inch of this material is visible as an edging.

The belt loops are apparently constructed as follows. One piece of noncontrasting fabric is folded around a strip of contrasting fabric.

The edges of the noncontrasting fabric do not meet, so that the contrasting fabric insert is visible as a verticle strip down the center of the belt loop. The two rear patch pockets are constructed as follows. Three pieces of noncontrasting fabric are cut in such a way that when aligned to form a pocket, two V-shaped gaps are created in the center of the pocket. A strip of contrasting fabric is sewn beneath the three strips, joining the top and bottom strips and completing the pocket by filling the gaps.

Style 98903 is also a pair of jeans stated to be 100-percent cotton. These jeans differ from style 98902 in that they have five belt loops that do not have fabric inserts, there is no edging along the front coin pocket, the rear patch pockets are not constructed with gaps, but rather have top flaps with dual snap closures, and the metal label riveted to the rear patch pocket has a silver rather than an antique gold finish.

Issue.—Whether the submitted samples are ornamented for tariff purposes.

Law and analysis.—In order to constitute ornamentation for tariff purposes a feature must both be listed as a form of ornamentation in schedule 3, headnote 3, Tariff Schedules of the United States (TSUS), and serve a primarily decorative rather than utilitarian function. See *Blairmoor Knitwear Corp.* v. *United States,* 60 Cust. Ct. 388, C.D. 3396 (1968).

Schedule 3, headnote 3, TSUS, provides that an article of textile material can be ornamented with, among other things, edging, textile fabric, and ornaments. Turning first to the trademark labels attached to the submitted samples, Customs has ruled that both metal and textile trademark labels fall within the purview of headnote 3, and that the identification of a manufacturer, by itself, is not considered a primarily utilitarian function. Therefore, such labels normally constitute ornamentation. However, an exception has been carved from this general rule. Relatively small, rectangular-shaped identifying labels containing only plain writing or plain block printing in an orderly arrangement, applied to garments in locations where such labels are visible during normal wear of the garments are not considered ornamentation.

This exception has been narrowly construed. Customs has repeatedly ruled that anything done to a label which is obviously meant to enhance the appearance of the label and, consequently, the garment upon which it appears, may cause the label to constitute ornamentation. For example, the use of varying sized letters, of stylized letters, of designs, or of decorative borders on a label, may constitute ornamentation.

The labels bearing the longhorn steer skull design which are attached to the waistband of these jeans are not considered ornamentation. The labels are made from what is apparently a coated or filled textile fabric and do not fall within the narrow label exception described above because of the skull design. However, because the labels are attached to the waistbands, and both garments have belt loops, Customs takes the position that the jeans would usually be worn with belts which would cover the labels. Features not visible during normal wear of the garment are not primarily decorative and, therefore, do not constitute ornamentation.

The metal labels attached to the patch pockets of these jeans are also not ornamentation. Metal labels have been held to be ornaments within the meaning of headnote 3. See Headquarters Ruling letter (HRL) 060436 dated August 16, 1979. However, the exception from the general rule of ornamentation described above applies equally to metal and textile labels. See HRL 052880 dated January 25, 1978. Both metal labels are relatively small and essentially rectangular in shape. Both labels contain only plain block letters in an orderly arrangement. All of the lettering on the labels is the same size and neither label contains a design or a decorative border. Therefore, both labels fall within the ornamentation exception.

The only difference between these metal labels is that one has silver finish while the other has a duller, antique gold finish. We realize that there is language in HRL 053880 (supra) to the effect that metal labels which are brightly colored or finished in a manner which is intended to catch a person's attention may constitute ornamentation. However, on inspection of the subject labels, and given the fact that both labels meet all of the criteria to fall within the narrow exception from ornamentation, we do not believe the slightly brighter finish of the silver label provides an adequate basis for distinguishing it from the antique gold label, for purposes of ornamentation.

The edging that is attached to the top of the front coin pocket on style 98902 also does not constitute ornamentation. Customs has held that piping less than one-quarter inch wide that is sewn in a seam along the edge of a pocket is not ornamentation. See HRL TC 471.3 dated November 5, 1962. The rationale for this position is that the piping reinforces an area that is subject to wear and stress. The subject edging is less than one-quarter inch wide and, while not sewn in a seam, does serve to reinforce the pocket edge. Therefore, we consider this edging primarily functional.

The belt loops on style 98902 do not constitute ornamentation solely because Customs has a uniform and established practice of not considering this type of construction for belt loops ornamentation. The patch pockets on style 98902, on the other hand, do constitute

ornamentation. Pockets are functional. However, the pockets on style 98902 are complete without the center strip of noncontrasting fabric. The top and bottom strips of noncontrasting fabric are joined together by the piece of contrasting fabric to form a finished pocket. The center strip of noncontrasting fabric is simply an overlay which creates the decorative V-shaped gaps. This overlay of textile fabric is primarily decorative and constitutes ornamentation.

Holding.—Accordingly, style 98902 of the submitted jeans is ornamented because of the construction of its patch pocket. These jeans are properly classifiable under the provision for other men's or boys' wearing apparel, ornamented: of cotton, in item 380.00, TSUS, dutiable, if a product of Hong Kong, at the column 1 rate of 35 percent ad valorem. Style 98903 of the submitted jeans is not ornamented. These jeans are properly classifiable under the provision for other men's or boys' wearing apparel, not ornamented: of cotton, not knit, other, in item 380.39, TSUS, dutiable, if a product of Hong Kong, at the column 1 rate of 16.5 percent ad valorem.

(C.S.D. 80–146)

Classification: Footwear With Exteriors Partially Covered With Leather

Date: December 17, 1979
File: CLA-2:R:CV:MA
054915 c

Re Decision on application for further review of protest No. 27047001311.

District Director of Customs,
Los Angeles, Calif.

Dear Sir: This protest was filed against your decision in the liquidation on May 13, 1977, of entry No. 269244 dated July 29, 1976, covering a shipment of footwear manufactured in the Republic of Korea.

This ruling concerns the tariff classification of footwear having uppers the exterior surface area of which are partially covered with leather.

Facts.—The footwear in issue, style Nos. 98630, 98633, and 98689, was entered under the provisions for leather footwear in items 700.35 and 700.45, Tariff Schedules of the United States (TSUS), with duty at the rate of 8.5 and 10 percent ad valorem respectively.

A Customs Form 28, dated September 9, 1976, requesting samples of the footwear in issue was sent to the protestant. We have no record

of receiving any samples in response to that request. There is no record of a laboratory report conducted on any shoes which can be identified with the subject entry.

In the absence of samples the footwear was classified upon liquidation under the provision for other footwear which is over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber or plastics and having uppers of which not over 90 percent of the exterior surface area is rubber or plastics, in item 700.60, TSUS, and dutiable at the rate of 20 percent ad valorem.

Pursuant to schedule 7, part 1, subpart A, headnote 3(b), TSUS, the footwear was appraised on the American selling price of the domestically produced Uniroyal Jaguar which was $8.50 less 2 percent.

The protestant maintains that classification of the footwear under item 700.60, TSUS, is precluded inasmuch as leather occupied over 50 percent of the exterior surface area of the footwear in issue.

On March 30, 1978, protestant forwarded samples of stock Nos. W98633 and W98630 which at that time were stated to be samples of two of the three styles in issue. The two stock numbers listed appeared on the entry documents. However, the samples submitted cannot with certainty be identified with the shipment in issue.

A laboratory analysis of the two sample shoes was conducted on May 4, 1978, by the U.S. Customs Laboratory in Washington, D.C. That analysis showed that leather covered 46.9 percent of the exterior surface area of the upper of style W98630 and 50.1 percent of the exterior surface area of the upper of style W98633.

The protestant has submitted the results of a laboratory analysis conducted on styles W98630 and W98689, by a private testing laboratory.

Those tests showed that leather covered 55.56 percent of the exterior surface area of the upper of style W98689 and 52.17 percent of the exterior surface area of the upper of style W98630.

The protestant claims that in contravention of section 152.2, Customs Regulations (19 CFR 152.2) it had no notice that a change in classification and appraisement had taken place until they received a liquidation notice and a bill dated, May 13, 1977, for increased duties.

The protestant states that the U.S. Customs Service violated section 152.24(c), Customs Regulations (19 CFR 152.24(c)) in the following manner:

> (1) Customs did not inform the importer of an ASP finding pursuant to section 152.24(c)(3), Customs Regulations (19 CFR 152.24(c)(3)).
>
> (2) The importer was not afforded the opportunity to examine samples of the footwear submitted by domestic producers which were utilized in arriving at the ASP determination pursuant to section 152.24(c)(4) Customs Regulations (19 CFR 152.24(c)(4)).

(3) Due to the failure of the Customs Service to notify the importer of its ASP determination, the importer was deprived of its right to file an internal advice request disputing the ASP appraisement pursuant to section 152.24(c)(5), Customs Regulations (19 CFR 152.24(c)(5)).

The protestant challenges the applicability of an American selling price by questioning whether the domestic prototype was freely offered.

The protestant claims that any presumption of correctness attaching to the action of the Customs officer involved fails in the instant case because there is no information in the Government's possession contradicting the statement of the manufacturer on Customs form 5523 that leather constituted 53 percent of the exterior surface of the uppers of the footwear involved.

The protestant has submitted a list of three other entries covering style Nos. 98630 and 98689 which were liquidated at your port under item 700.35, TSUS. This information was submitted to show that the instant footwear should also be classified as leather footwear. However, the protestant makes it clear that it is not in a position to contend that these shoes are the same as those in issue but points out that the styles are the same.

Issue.—(1) Does the presumption of correctness apply to the action of the Customs officer in this case?

(2) Is the classification under item 700.60, TSUS, and the appraisement on the American selling price of a similar domestic prototype void by reason of the failure of the Customs Service to follow its own procedural regulations?

(3) Must the invoice statements on Customs form 5523 that leather constituted 53 percent of the exterior surface area of the uppers of footwear be accepted at face value in the absence of evidence to the contrary?

(4) Did leather constitute over 50 percent of the exterior surface area of the uppers of the footwear involved so as to preclude classification under item 700.60, TSUS?

(5) Is the domestic prototype freely offered as required by section 402a(g), Tariff Act of 1930, as amended?

Law and analysis.—Title 28, United States Code, section 2635, as amended by the Customs Courts Act of 1970, provides as follows:

> In any matter in the Customs Court:
>
> (a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging a decision.

The presumption of correctness with respect to the action of the Customs officer involved is a judicial presumption which arises in a Customs Court proceeding. On the administrative level, as in this

instance, we will take into account all the facts we can ascertain and the circumstances which led to the liquidation of the instant entry under item 700.60, TSUS. We will not presume that the action of the Customs officer involved was correct.

The failure to send the protestant a notice of increased duties pursuant to section 152.2, Customs Regulations (19 CFR 152.2) does not invalidate the liquidation because the protestant's right to protest was not prejudiced by our action.

The classification of the instant footwear under item 700.60, TSUS, and its appraisement on the American selling price of the Uniroyal Jaguar is not void because the Customs Service did follow its own procedural regulations.

Section 152.24(c)(2) Customs Regulations (19 CFR 152.24(c)(2)) requires that importers of footwear classifiable under item 700.60, TSUS, provide the appropriate Customs officer at the port of entry with a sample from the first commerical shipment of each model or style of such footwear imported into the United States. The samples are then forwarded to the area director, New York Seaport Area, for ASP determination.

Although the protestant states a belief that it supplied a sample to Customs in response to a request therefor, we have no record of receipt of that sample. Without a sample of the footwear in issue, the area director, New York Seaport Area, could not comply with the requirements of section 152.24(c), Customs Regulations (19 CFR 152(c)).

As support for its position that the invoice statement, in conjunction with purchase order, must be accepted at face value in the absence of evidence establishing the contrary, the protestant has cited a Customs ruling, C.S.D. 79-274, dated January 23, 1979. That ruling held that invoice prices shown for certain scissors represented the export value which must be accepted in the absence of evidence establishing the falsity of the invoices. Further, circumstantial evidence which creates a doubt as to the bona fides of the invoice prices may invite closer scrutiny of the transaction, but cannot be used to reject such price, if unsupported by evidence establishing such falsity.

Our experience with respect to that information on invoices dealing with the exterior surface area of footwear uppers supplied by foreign manufacturers is that such information is unreliable. This is true not because the foreign manufacturers deliberately falisfy the measurement of the upper, but because they do not know precisely what to measure in determining the exterior surface area of footwear uppers. Consequently, many such measurements are inaccurate.

It is our view that the known unreliability of invoice information with respect to the measurement of the exterior surface area of shoe uppers distinguishes it from the value information shown on invoices.

Therefore, we do not agree that the exterior surface measurement of the footwear upper shown on the Customs form 5523 must be accepted at face value.

The liquidation of three other entries covering the style Nos. 98630 and 98689 under item 700.35, TSUS, does not sustain protestant's claim at all inasmuch as it admits that these styles were not produced by the same manufacturer.

Under the circumstances we believe that the sample shoes submitted to this office with the protestant's letter, dated March 30, 1978, is the best evidence as to the composition of the exterior surface area of the styles in issue.

It is our position based on the laboratory report issued by the U.S. Customs Laboratory in Washington, D.C., that style W98633 is precluded from classification under item 700.60, TSUS, because leather comprises over 50 percent of the exterior surface area of its upper. However, style W98630 is not excluded from classification under item 700.60, TSUS, because leather does not cover over 50 percent of the exterior surface area of its upper.

The protestant did not submit a sample of style W98689 with its letter of March 30, 1978. However a laboratory analysis of that style by the (name of laboratory) shows that leather occupies over 50 percent of the exterior surface area of that style. Consequently, it is our position that style W98689 is excluded from classification under item 700.60, TSUS.

We note that the protestant states that there is a substantial question as to whether the domestic prototype was freely offered to all purchasers. The Customs Service was satisfied at the time of exportation of the footwear in issue that the domestic model was freely offered in compliance with section 402/402a, Tariff Act of 1930.

Holding.—You should allow the protest with respect to styles W98633 and W98689 and deny the protest with respect to style W98630.

(C.S.D. 80-147)

Classification: Vinyl Mittens for Children Designed for Use in Skiing

Date: January 7, 1980
File: CLA-2:RRUCGC
061029 c

Re Decision on application for further review of protest No. 1001–8–006868.

This protest was filed on June 1, 1978, against your decision in the liquidation on March 10, 1978, of entry No. 78-247377, dated December 17, 1977, at the port of New York.

This ruling concerns the tariff classification of certain gloves manufactured in Taiwan.

Facts.—The gloves are described as vinyl mittens, style No. 3281–39. The mittens feature a hook and clasp, an extra piece of vinyl stitched along the thumb portion, cuffs with an elastic gauntlet, and a three-ribbed piece of vinyl across the knuckles. These mittens are designed for children between 3 and 7 years of age.

The mittens were classified in liquidation under the provision for gloves of rubber or plastics: * * * Other, in item 705.86, Tariff Schedules of the United States (TSUS), and duty was assessed at the rate of 35 percent ad valorem.

The protestant claims that the mittens are classifiable under the provision for other ski equipment, in item 734.97, currently 734.99, TSUS, and dutiable at the rate of 9 percent ad valorem, or free under the Generalized System of Preferences (GSP). In the alternative, the protestant claims that the mittens are classifiable under item 735.05, TSUS, the provision for boxing gloves, and other gloves, not provided for in other provisions of subpart D, part 5, schedule 7, TSUS, specially designed for use in sports, and dutiable at the rate of 7.5 percent ad valorem, or free under the GSP. The claim is based upon *Stonewall Trading Co.* v. *United States*, 64 Cust. Ct. 482, C.D. 4023 (1970).

You maintain that mittens designed for children from 3 to 7 years of age are not chiefly used for skiing in view of the small number of people in that age group who ski. As to the protestant's alternative claim, you state that there are no winter sports engaged in by this age group for which these mittens show special design.

Issue.—(1) Do children ranging in age from 3 to 7 years engage in the sport of skiing?

(2) Do the gloves possess those characteristics which show that they are specially designed for use in the sport of skiing?

Law and analysis.—Information before this office is that children of very tender years including 2-year-olds, engage in the sport of skiing.

In the *Stonewall Trading* case, *supra*, the court ruled that certain vinyl gloves were properly classifiable under the provision for other ski equipment, in item 734.97, TSUS. Those gloves were found to possess the following characteristics:

1. A hook, and clasp to hold the gloves together.
2. An extra piece of vinyl stitched along the thumb portion to meet the stress caused by the flexing of the knuckles when the skier grasps the ski pole.
3. An extra piece of red-colored vinyl with padding reinforcement and inside stitching, which is securely stitched across the middle of the glove where the knuckles bend and cause stress.
4. Cuffs with an elastic gauntlet to hold the glove firmly

around the wrist, so as to be waterproof, and to keep it securely on the hand.

The gloves in issue are in all material respects similar to the gloves which were the subject of the above cited case. They meet all the tests set forth therein and are specially designed for use in the sport of skiing. There is no requirement that such gloves be chiefly used in the sport of skiing in order to qualify for classification under item 734.97, currently 734.99, TSUS.

The vinyl mittens, style No. 3281-39, are classifiable under the provision for other ski equipment, in item 734.97, currently 734.99, TSUS, and dutiable at the rate of 9 percent ad valorem or entitled to free entry under the Generalized System of Preferences, if otherwise qualified.

Holding.—You should allow the protest. Your file is returned.

(C.S.D. 80-148)

Vessel Repairs: Burden of Proof To Support Remission of Duties Under 19 U.S.C. 1466(a); Dutiability of Cleaning Costs

Date: January 9, 1980
File: VES-13-18-RRUCDC
104396 JL

This ruling concerns a petition for remission of vessel repair duties filed under section 4.14(k), Customs Regulations.

Issues.—(1) Has the petitioner carried its burden under the vessel repair statute of establishing by good and sufficient evidence that the repairs were necessitated by a casualty?

(2) Are the expenses of cleaning the quay in which the vessel rests while repairs are effected dutiable as a part of the cost of repairs?

Facts.—Excerpts of daily logs submitted by the petitioner disclose that the vessel, an oceangoing tugboat, suffered an anchor winch failure while on duty in the North Sea on May 18, 1977. The vessel subsequently put into Great Yarmouth, England, for repairs.

Details of the work carried out from May 29, 1977, to June 30, 1977, disclose that a new main drive shaft was installed in the winch unit, the engine was serviced, oil changed, etc. The new drive shaft was forwarded from the United States for installation into the winch unit. Also, two men from the Great Yarmouth yard were utilized to assist the vessel's engineers with powerpack changes on the port and starboard engines. Men from the yard were also utilized to assist the crew with installation of the port tow cable. Last, the quay was cleaned of the vessel's rubbish, empty drums, cables, steel, wire, etc.

The petitioner's position is that the vessel repairs should be either classified as necessary due to stress of weather or other casualty pursuant to 19 U.S.C. 1466(d), or classified as free of duty as staging costs pursuant to CIE 1822/58 and 19 U.S.C. 1466(a).

Law and analysis.—In headquarters case 104229, dated October 11, 1979, it was held that the cost of repairs accomplished in a foreign country on a main circulating pump of a vessel are not remissible under the vessel repair statute when there has been no evidence presented tending to show that the failure of the pump was not attributable to normal wear and tear. (citing CIE's 1347/58, 920/60, 872/60, and headquarters case 103573, dated Oct. 3, 1978).

CIE 1822/58, dated October 29, 1957, held, among other things, that the erection of staging necessary to facilitate work is not classifiable as repairs under the vessel repair statute.

In the instant case the petitioner has submitted no evidence other than excerpts from the daily log which merely has a notation "anchor winch will not clutch in." Under the ruling in case 104229, no remission can be allowed on the basis of a bare assertion by a petitioner that repairs were necessitated by a casualty.

Staging costs are costs incurred for the erection of temporary structures that are used for support while a vessel is undergoing repairs, in other words scaffolding. It is obvious that the cost of cleaning the quay of rubbish generated while repairs were effected cannot be classified as staging costs. However, in CIE 18/48, dated January 12, 1948, it was held that cleaning which is not preparatory to the making of dutiable repairs is not dutiable under the vessel repair statute. We are of the opinion that the cleaning charges in this case were not part of the costs of repairs effected to the vessel and observe that they are analagous to drydocking charges which were also held to be duty free in CIE 18/48.

Notwithstanding the above, however, the invoice from the yard and the details of work carried out furnished by the yard do not break down the amount spent on each classifiable item. Consequently, the principle espoused in CIE 1188/60 that the costs of nondutiable repairs may only be remitted provided the charges therefor are segregated from other charges will control, and the cleaning cost will be dutiable as it is not segregated from the dutiable charges.

Holding.—(1) The cost of repairs accomplished in a foreign country on an anchor towing winch of a vessel are not remissible under the vessel repair statute when there has been no evidence presented tending to show that the failure of the winch was not attributable to normal wear and tear.

(2) The cost of cleaning the quay in which a vessel was berthed during the time that repairs were effected to it are not classifiable as

repairs under the vessel repair statute, providing charges therefor are segregated from the dutiable charges on the invoice supplied by the shipyard.

(C.S.D. 80-149)

Generalized System of Preferences: Certificate-of-Origin Form A; Procedure in Cases of Doubtful Authenticity

Date: January 9, 1980
File: RRUCV RP
061616

Re application for further review of protest No. 2704-8-00948.

District Director of Customs,
Los Angeles, Calif.

Dear Sir: The subject protest concerns the qualification of certain imported tape recorders for duty-free treatment under the Generalized System of Preferences (GSP). The merchandise in question was imported from Hong Kong.

Section 10.176(a) of the Customs Regulations states that merchandise:

> May qualify for duty-free entry under GSP only if the sum of the cost or value of the materials produced in the beneficiary developing country (BDC) plus the direct costs of processing operations performed in such country is not less than 35 percent of the value of the article as appraised in accordance with section 402 or 402a, Tariff Act of 1930, as amended.

Furthermore, section 10.178(a) states:

> As used in 10.176, the words, direct costs of processing mean those costs either directly incurred in, or which can be reasonably allocated to, the growth, production, manufacture, or assembly of the specific merchandise under consideration.

In the instant case, duty-free treatment under the GSP for the subject merchandise was disallowed, based on the import specialist's conclusion that the 35-percent requirement had not been fulfilled. The file in this case reflects that a manufacturer's cost-breakdown sheet was submitted to Customs which included an amount for research and development of an unspecified nature. The import specialist determined that the research and development cost was not properly part of the direct costs of processing operations, since no evidence was submitted to demonstrate that this cost related solely to the manufacture of the merchandise in question within the meaning of section 10.178(a)(3), Customs Regulations. The exclusion of the research and development cost rendered the beneficiary de-

veloping country (BDC) input less than 35 percent. Consequently, the subject merchandise was not afforded duty-free treatment under the GSP.

It is the position of the protestant that both the certificate-of-origin form A and the manufacturer's cost-breakdown sheet indicate a BDC input greater than the required 35 percent; therefore, the subject tape recorders qualify for GSP treatment.

We note that the record in this particular case indicates that the importer (protestant) complied with section 10.173, Customs Regulations, by filing a duly executed certificate-of-origin form A with district director for each entry. Apparently, Customs also requested and received a manufacturer's cost-breakdown sheet from that importer.

In the absence of a reasonable likelihood that eligible merchandise would not meet the minimum 35 percent origin criterion under the GSP, it is presumed that the form A, issued by the appropriate certifying authority, is correct. In the administration of the GSP, it is an established practice to require that the district director forward the certificate-of-origin form A to headquarters for reverification, if the district director has reason to doubt the authenticity of the form A or its contents. Upon receipt of the form A, headquarters will conduct the reverification and provide advice to the district director as to the disposition of the entry with regard to the GSP.

In the case before us, the above-referenced procedure was not followed. Accordingly, you are directed to grant the protest in full.

(C.S.D. 80-150)

American Selling Price: Revisions or Amendments to Catalogs and Price Lists for Footwear; Requirement to Promptly Furnish Under 19 CFR 152.24

Date: July 24, 1980
File: CLA-2:RRUC SEC 065347

AREA DIRECTOR, NEW YORK SEAPORT,
New York, N.Y.

DEAR SIR: This letter concerns the administration of the American selling price provisions as they apply to footwear.

As you know, section 152.24 of the Customs Regulations provides that in order for domestic producers of footwear of the same class or kind as that classifiable under item 700.60, Tariff Schedules of the United States, to insure consideration of their merchandise in making

determinations regarding the existence or nonexistence of an American selling price, they shall furnish you with catalogs and price lists covering such footwear. The regulations further provide that revisions or amendments to the catalogs and price lists shall be promptly forwarded to you along with the required certifications.

We have become aware that revisions and amendments of price lists are frequently not promptly furnished, thereby hampering the orderly administration of the American selling price provisions as they apply to footwear. Consequently, we shall make it known by publication of this letter that the Customs Service shall consider that amendments or revisions to price lists and catalogs submitted more than 60 days after the effective date of the revisions or amendments will not be considered promptly furnished. Revisions or amendments to catalogs and price lists submitted less than 60 days from the effective date of the changes shall be applied from the date of the changes. Revisions or amendments to catalogs and price lists submitted more than 60 days from the effective date of the changes shall be applied no more than 60 days back from the date of receipt of the changes by the Area Director, New York Seaport. You should be guided accordingly.

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1252)

ARMSTRONG BROS. TOOL CO. ET AL. *v.* THE UNITED STATES, No. 80-20

1. ITC DETERMINATION OF NONINJURY

Appeal from judgment of U.S. Customs Court, 483 F. Supp. 312, 84 Cust. Ct. ——, C.D. 4838 (1980), which upheld the International Trade Commission's (ITC's) determination that a domestic industry was not being injured or likely to be injured or prevented from being established by reason of importation of tools (wrenches, pliers, screwdrivers, and metal-cutting snips and shears) from Japan that were being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. 160(a)). Affirmed.

2. STANDARD OF REVIEW

The sole standard of review of factual determinations of injury or likelihood of injury in antidumping cases is whether the ITC's determination is supported by substantial evidence.

U.S. Court of Customs and Patent Appeals, August 7, 1980

Appeal from U.S. Customs Court, C.D. 4838

[Affirmed.]

Frederick L. Ikenson, attorney for appellants.

Alice Daniel, Assistant Attorney General, *David M. Cohen,* Director, *Joseph I. Liebman,* Attorney in Charge, Field Office for Customs Litigation *Sidney N. Weiss,* Commercial Litigation Branch.

H. William Tanaka, Lawrence R. Walders, Wesley K. Caine, attorneys for party-in-interest, appellee.

[Oral argument on June 5, 1980 by Frederick L. Ikenson, for appellants, Sidney N. Weiss, appellee United States, Wesley K. Caine for appellee party-in-interest.]

Before: MARKEY, *Chief Judge,* RICH, BALDWIN and MILLER, *Associate Judges,* and RE, *Chief Judge,* U.S. Customs Court.[1]

[1] The Honorable Edward D. Re, Chief Judge, U.S. Customs Court, sitting by designation.

MILLER, Judge.

This is an [1] appeal from a judgment of the U.S. Customs Court, 483 F. Supp. 312, 84 Cust. Ct.——, C.D. 4838 (1980), upholding the determination of the U.S. International Trade Commission (ITC) that a domestic industry was not being injured or likely to be injured or prevented from being established by reason of the importation of tools (wrenches, pliers, screwdrivers, and metal-cutting snips and shears) from Japan that were being, or likely to be, sold at less than fair value within the meaning of section 201(a) of the Antidumping Act of 1921, as amended (19 U.S.C. 160(a)).[2] We affirm.

The background and relevant facts are thoroughly presented in the opinion of the Customs Court and need not be repeated.

In appeals from the Customs Court involving determinations of injury or likelihood of injury in antidumping and countervailing duty cases considered by the Tariff Commission (now the ITC), this court has conducted its review upon the record made before the Commission [3] and has held that such review is limited to determining "whether the Commission has acted within its delegated authority, has correctly interpreted (pertinent) statutory language, and has correctly applied the law." *City Lumber Co.* v. *United States*, 59 CCPA 89, 92, C.A.D. 1045, 457 F. 2d 991, 994 (1972). As to the evidentiary record, the standard of this review has been stated to be whether the Commission's determination is supported by substantial evidence.[4] *City Lumber Co., supra* at 95, 457 F. 2d at 996. In *Imbert Imports, Inc.* v. *United States*, 60 CCPA 123, 127, C.A.D. 1094, 475 F. 2d 1189, 1192 (1973), the point was made that even if the Administrative Procedure Act applied (not decided), the Commission's determination was not arbitrary or an abuse of discretion. However, there appears to be no real

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[2] 19 U.S.C. 160(a) provides as follows:

(a) Whenever the Secretary of the Treasury (hereinafter called the Secretary) determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less than its fair value, he shall so advise the U.S. Tariff Commission, and the said Commission shall determine within 3 months thereafter whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. * * *

The U.S. Tariff Commission was subsequently renamed the U.S. International Trade Commission by section 171(a) of the Trade Act of 1974 (19 U.S.C. 2231(a) (1976)).

[3] *De novo* review by the Customs Court in a countervailing duty case was approved by this court, where the administrative record before the Treasury Department was clearly deficient, in *ASG Industries Inc.* v. *United States*, 67 CCPA ——, 610 F. 2d 770, C.A.D. 1237 (CCPA 1980). In such a case, this court's review would be on the record developed before the Customs Court. The Trade Agreements Act of 1979 (Public Law 96-39, 93 Stat. 144, 302 (1979)) requires an adequate record, and this court may now apply the normal standards of review of trial court judgments.

[4] In *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966), the Supreme Court said:

We have defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229 * * *. This is something less than the weight of the evidence, and the possibility of drawing two inconsistant conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

difference between such standards. *See Imbert Imports, Inc., id.*, where this court said:

> In short, we find that the findings of the Commission are supported by substantial evidence, and that the factors pointed out in the chairmans [sic] dissent are not of sufficient moment to establish that the decision of the majority was arbitrary.

In view of the foregoing, we conclude that the issue before this court in this case is properly stated to be whether the Customs Court correctly held that the Commission's determination is supported by substantial evidence in the record. This accords with the standard established by Congress in the Trade Agreement Act of 1979, which added a new section 516A to the Tariff Act of 1930, (Public Law 96–39, 93 Stat. 144, 302 (1979)). See also *ASG Industries, Inc., supra.*

Our review of appellants' arguments and portions of the record relating thereto persuades us that the Customs Court's holding is correct.

In affirming the judgment of the Customs Court, we adopt the court's opinion as our own, with the single modification that we would state the **[2]** sole standard of review of factual determinations of injury or likelihood of injury in antidumping cases to be whether the Commission's determination is supported by substantial evidence.

Affirmed.

Decisions of the United States Customs Court

United States Customs Court

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao
Morgan Ford
Scovel Richardson
Frederick Landis
James L. Watson
Herbert N. Maletz
Bernard Newman
Nils A. Boe

Senior Judge

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Customs Decisions

(C.D. 4866)

RANK PRECISION INDUSTRIES, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Television Camera Lens System

SECTION 315(d)—FINDING MADE AFTER ALLEGED CHANGE IN PRACTICE

Where entry by plaintiff and liquidation of the subject merchandise by the district director under item 708.23, TSUS, occurred more than 2 years prior to a finding by the Secretary of the Treasury

(or his delegate) of an established and uniform practice in classifying the merchandise under item 685.10, TSUS, plaintiff's claim that an established and uniform practice was changed without notice in violation of section 315(d) of the Tariff Act of 1930, as amended, cannot be sustained. The statute is clear that the notice requirements for a change of practice are intended for the benefit of importers whose entries are made after a finding of an established and uniform practice. Plaintiff's contention that in 1974 (the year of importation) it relied upon the finding made in 1976 is obviously without merit.

MOUNTED LENSES (ITEM 708.23, TSUS)—"MORE THAN" DOCTRINE

The provision in item 708.23, TSUS, for mounted lenses is not applicable to merchandise which is "more than a transparent substance used to form an image fixed in a proper backing, support or setting." *Kalimar, Inc.* v. *United States*, 66 Cust. Ct. 112, 116, C.D. 4178 (1971). Hence, a Varotal 30 television camera lens system which, in addition to a mounted lens, includes many significant electrical and mechanical components that are not embraced by the common meaning of the term "mounted lens" (as determined in *Kalimar*), is more than a mounted lens within the purview of item 708.23, TSUS.

OPTICAL INSTRUMENTS—STATUTORY DEFINITION IN HEADNOTE 3, PART 2, SCHEDULE 7

In determining whether imported merchandise is classifiable as an optical instrument under the TSUS, the statutory definition of the term in headnote 3, part 2, schedule 7 is controlling. *United States* v. *Ataka America, Inc.*, 64 CCPA 60, 65, n. 4, C.A.D. 1184, 550 F. 2d 33 (1977). Under the definition of optical instruments in headnote 3, the issue is not whether the optical element is subsidiary or dominant, but rather "the statutory distinction is between 'subsidiary' and *not* 'subsidiary.'" [Italic added.] (*Id.* at 66, n. 5.) Since the subject merchandise incorporates one or more optical elements which are not subsidiary with regard to the operation of the article, it is properly classifiable as an optical instrument under item 708.89, TSUS. *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, 13, C.D. 4668 (1976).

SAME—"INSTRUMENT" DEFINED

Webster's New International Dictionary (2d ed. 1950), p. 1288, broadly defines the term "instrument," as follows: "That by means of which any work is performed or result is effected; a medium; means." The Varotal 30 television camera lens system is an instrument within the foregoing definition, and within headnote 3, part 2, schedule 7, TSUS.

STATUTES INVOLVED

19 U.S.C. 1202, Tariff Schedules of the United States:

Classified:

Schedule 7, part 2, subpart A:

Lenses, prisms, mirrors, and other optical

elements, all of the foregoing whether mounted or not mounted:

* * * * * * *

Mounted:

Lenses:

* * * * * * *

708.23	Other	12.5% ad val.

Defendant's alternative claim:

Optical appliances and instruments not provided for elsewhere in part 2 of this schedule; frames and mountings for such articles, and parts of such frames and mountings:

* * * * * * *

708.89	Other appliances and instruments	22.5% ad val.

Plaintiff's claim:

Schedule 6, part 5:

Radiotelegraphic and radiotelephonic transmission and reception apparatus; radiobroadcasting and television transmission and reception apparatus, and television cameras; record players, phonographs, tape recorders, dictation recording and transcribing machines, record changers, and tone arms; all of the foregoing, and any combination thereof, whether or not incorporating clocks or other timing apparatus, and parts thereof:

685.10	Television cameras, and parts thereof	6% ad val.

Court No. 76-12-02771

[Dismissed without affirming classification of District Director.]

Decided July 28, 1980

Siegel, Mandell & Davidson, Esqs. (*Herbert T. Posner,* Esq. of counsel) for the plaintiff.

Alice Daniel, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, Field Office for Customs Litigation, and *Sidney N. Weiss,* trial attorney, for the defendant.

NEWMAN, Judge: This action presents for determination the proper classification, and hence the proper rate of duty, for a Varotal 30 lens package imported by plaintiff from England and entered at the port of Chicago, Ill., on June 25, 1974. In liquidating the entry, Customs classified the imported article as a mounted lens (other than projection) under item 708.23 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, and assessed duty at the

rate of 12.5 per centum ad valorem. As an alternative classification, the Government claims that the merchandise is encompassed by the provision in item 708.89, TSUS, as modified, for "Other (optical) appliances and instruments," for which the rate of duty is 22.5 per centum ad valorem. Plaintiff claims that the merchandise is properly dutiable at the rate of 6 per centum ad valorem under the provision in item 685.10, TSUS, as modified, for parts of television cameras.

I find that the merchandise is classifiable under item 708.89, TSUS, as alternatively claimed by the Government. Accordingly, this action is dismissed without affirming the classification of the District Director under item 708.23, TSUS.

SAME—TELEVISION CAMERA LENS SYSTEM

The Varotal 30, which was referred to by plaintiff's witness as an "optical system" and as an "optical package," is essentially a television camera lens with a sophisticated system of electronic and mechanical controls for the iris (aperture), zoom, and focus, which are all optical features of the merchandise. Since the record shows that the major electromechanical components of the merchandise are directly related to the optical function of the lens system, the electromechanical features of the Varotal 30 do not exclude the merchandise from the definition of "optical instruments" in headnote 3, part 2, schedule 7, TSUS. *Cf. Corning Glass Works* v. *United States*, 82 Cust. Ct. 249, C.D. 4807 (1979). The "Tally" lights are ancillary and subordinate to the optical components of the merchandise.

GENERAL INTERPRETATIVE RULE 10(ij)—PARTS OF TELEVISION CAMERAS SPECIFICALLY PROVIDED FOR AS OTHER OPTICAL APPLIANCES AND INSTRUMENTS

Since the subject merchandise is specifically provided for as an optical appliance or instrument under item 708.89, TSUS, classification as part of a television camera under item 685.10, TSUS, is precluded by general interpretative rule 10(ij). *Cf. Jensen, supra*, 77 Cust. Ct. at 21.

THE FACTS [1]

The Varotal 30 is a television camera lens system comprised of a number of optical, electrical, and mechanical components.[2] The

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[1] The record consists of the testimony of five witnesses called on behalf of plaintiff and one witness called by defendant. Plaintiff's witnesses were: Brendan M. Murphy, treasurer of plaintiff, Rank Precision Industries, Inc.; Kish B. Sadhvani, plaintiff's product manager; Raymond J. Smith, employed by RCA Corp. as engineering manager for camera equipment; David Frederick Shade, chief accountant for Rank Taylor Hobson, Leichester, England; and Walter David, Jr., operations manager for Optical Imports, Inc. Defendant called as its witness Dr. Leonard Bergstein, professor of electro-optical sciences at Polytechnic Institute of New York. Both parties submitted various exhibits. The official papers were received without marking.

[2] The importation, when assembled in operating condition, consists of the following component parts: Power supply module, iris servo drive module, focus servo module drive, zoom servo module drive, systems board, dual demand shot box, adjustable pan bar S type, Tally lights, focus demand control, range extender remote control, electrical connecting cables, in addition to basic 10:1 zoom lens unit.

primary function of this optical-electro-mechanical system is to transmit light and a focused image to the broadcast equipment, where it is converted into electrical signals.

The optical unit of the Varotal 30 contains the glasses of the lens and includes four main subassemblies: The focus unit, the zoom unit, the iris unit, and the rear unit. To the body of the optical unit are fitted three drive units for controlling the focus, the zoom, and the iris mechanism (aperture) of the lens. The iris unit consists of a system of blades that regulate the amount of light transmitted through the lens to the pickup tubes located within the television camera body, and is operated by means of an iris servo drive module. The zoom feature of the lens is accomplished by changing the positioning of the optical elements so as to vary the effective magnification of the lens.

A motor drive allows zoom by electromechanical movement of the optical elements within the system. An adjustable pan bar S type provides a zoom rate method of servo zoom control. The dual demand shot box is a programing component which provides a method of preset servo control of both focus and zoom functions. The Varotal 30 also includes a number of circuits, amplifiers, switches, and other electrical components that are necessary to power and control the operation of the lens. In addition to the electrical components, the Varotal 30 includes various mechanical components that are required for the control and power of the lens and to interface the system with the television camera.[3] Finally, the imported merchandise contains two Tally lights that are the means by which the performers are made aware of the camera on the air.

OPINION

I

Initially, we consider plaintiff's claim that classification of the subject merchandise by the District Director under item 708.23, TSUS, represents a change, without notice, of a prior uniform and established practice (viz, during the years 1970–72) of classifying the merchandise as parts of television cameras under item 685.10, TSUS, in violation of section 315(d) of the Tariff Act of 1930, as amended (19 U.S.C. 1315(d)). That provision reads:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse

[3] The subject merchandise is connected directly to the front of the television camera.

> for consumption prior to the expiration of 30 days after the date of publication in the weekly Treasury decisions of notice of such ruling * * *.

At the outset, it must be determined "whether the Secretary of the Treasury (or his delegate) has made a 'finding' of 'an established and uniform practice' pursuant to section 315(d)". *Ditbro Pearl Co.* v. *United States*, 62 CCPA 95, 96, C.A.D. 1152, 515 F. 2d 1157 (1975); *Asiatic Petroleum Corp.* v. *United States*, 59 CCPA 20, 22, C.A.D. 1029, 449 F. 2d 1309 (1971). In order to establish the requisite finding under the statute, plaintiff introduced in evidence a letter by Customs dated August 31, 1976 (exhibit 3), concerning the tariff classification of "motorized television lenses for industrial television cameras produced in West Germany".[4] This letter, somewhat equivocally, states:

> (I)t appears that a uniform and established practice exists of classifying the merchandise in question under the provision for parts of television cameras, in item 685.10, TSUS.

Plaintiff contends that it "was entitled to rely upon the 'finding' made by the Customs Service" (brief, 24).

Significantly, the official papers show that the entry in this case was made on June 25, 1974, and liquidated on July 19, 1974—more than 2 years prior to the finding of an established and uniform practice, as set forth in exhibit 3. Consequently, it is obvious that at the time of importation in 1974 plaintiff could not have relied upon the section 315(d) finding made by Customs in 1976. Indeed, the statute is clear that the notice requirement for a change of practice is intended for the benefit of importers whose entries are made after a finding of an established and uniform practice. *Asiatic Petroleum Corp., supra.*

In order to substantiate the August 31, 1976 finding, plaintiff presented the testimony of its witness Murphy concerning the liquidations in 190 entries by plaintiff of Varotal systems and other merchandise [5] at the ports of New York, Chicago, and Los Angeles during the period of 1970–72.[6] It appears that of these 190 entries, 182 were liquidated as television camera parts, and 8 were liquidated as mounted lenses (R. 32).[7] Thus, rather than proving the existence of an established and uniform practice during 1970–72, Murphy's testimony demonstrates

[4] The "motorized television lenses" are described in the letter as follows: "These are motorized * * * television lenses for use on closed circuit vidicon television cameras. The television lenses are controlled by three motors, and power is transmitted to the lens elements and the iris by a system of cables which are attached to the television camera and the television lens".

[5] The 190 entries included Varotal systems and parts thereof, closed circuit television systems, cables, and other parts of television cameras.

[6] The letter of Aug. 31, 1976 (exhibit 3), does not show that a uniform and established practice of classifying the merchandise under item 685.10 existed in the 1970–72 period, which is the period of time relied upon by plaintiff.

[7] Plaintiff's witness David also testified that television lens systems, manufactured by Aegeneiux and imported by Optical Imports, Inc., from 1969 to 1973, were classified and liquidated by Customs as parts of television cameras under item 685.10, TSUS.

that there was some ambivalence on the part of Customs respecting the appropriate classification for the merchandise. Moreover, in a letter written on February 15, 1973, by Customs to plaintiff (exhibit A), plaintiff was notified that zoom lenses and rear units for television cameras were not classifiable as parts of television cameras in view of the specific provision in item 708.23, TSUS, for mounted lenses, citing general interpretative rule 10(ij).

In sum, since as of the liquidation date (July 19, 1974) there was no finding under section 315(d) relating to the subject merchandise, nor was there in fact an established and uniform practice during the years 1970–72 of classifying the merchandise as parts of television cameras under item 685.10, TSUS, I find that plaintiff's claim under section 315(d) is without merit.

II

We now turn to the merits of whether the Varotal 30 system was properly classified by Customs as a mounted lens under item 708.23, TSUS. Plaintiff maintains, and I agree, that the merchandise is more than a mounted lens within the common meaning of that term.[8]

As recently observed by Chief Judge Markey of our Appellate Court in *United States* v. *Texas Instruments*, 67 CCPA ——, C.A.D. 1244, —— F. 2d —— (1980):

> Only the most general of rules can be ascertained from the previous decisions dealing with the "more than" doctrine, and it appears that each case must in the first analysis be determined on its own facts. *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, 34, C.A.D. 1032, 450 F. 2d 1396, 1398 (1971) * * *.

And in *Green*, *supra*, the Appellate Court also stated (59 CCPA at 34):

> * * * In order to determine if an article is more than that provided for in a particular tariff provision, it is necessary to ascertain the common meaning of the tariff provision and compare it with the merchandise in issue. It is well established that in determining the common meaning of a term or word used in a tariff provision, court decisions, dictionary definitions, and other lexicographical authorities may be considered.

See also *Ozen Sound Devices* v. *United States*, 67 CCPA ——, C.A.D. 1246, —— F. 2d —— (1980); *The Englishtown Corporation* v. *United States*, 64 CCPA 84, 87, C.A.D. 1187, 553 F. 2d 1258 (1977).

In support of its contention that the Varotal 30 is more than a "mounted lens" within the common meaning of that term, plaintiff cites *Kalimar, Inc.* v. *United States*, 66 Cust. Ct. 112, C.D. 4178 (1971).

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[8] Defendant does not claim that the provision in item 708.23, TSUS, for mounted lenses should be construed in accordance with any special commercial meaning or designation that differs from the common meaning. For an in depth discussion of commercial disignation see *S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 82 Cust. Ct. 197, C.D. 4802 (1979).

There, a Kali-Copier for the Polaroid Swinger camera used to make copies of photographs and other objects was assessed with duty as "Other (optical) appliances and instruments" under item 708.89, TSUS, and was claimed by the importer to be properly dutiable as other mounted lenses under item 708.23, TSUS. The copier consisted of a metal frame or stand and close-up lens in a black circular casing. The Government argued that the mounted lens portion of the copier consisted only of the lens and its casing, and therefore the copier was more than a mounted lens. Hence, the issue was whether the imported copier was a mounted lens or more than a mounted lens for tariff purposes. Judge Maletz, writing for the First Division, held that the copier was more than a mounted lens, viz: it was a mounted lens with the added feature of a copying stand. In reaching its determination in *Kilimar*, the court cited and adopted the following definitions contained in Webster's New World Dictionary of the American Language, College Edition (1962) (66 Cust. Ct. at 116):

> Lens * * * 1. a piece of glass, or other transparent substance, with two curved surfaces, or one plane and one curved, regularly bringing together or spreading rays of light passing through it: a lens or combination of lenses is used in optical instruments to form an image: * * *.
>
> Mounted * * * 4. fixed on or in the proper backing, support, setting, etc. * * *.
>
> Mount * * * 6. to place, fix, or fasten on or in the proper support, backing, etc. for the required purpose; specifically, (a) to fix (a jewel) in a setting; (b) to fix (a specimen) on (a slide) for microscopic study; (c) to arrange (a skeleton, dead animal, etc.) for exhibition. * * *.

Applying the foregoing definitions, the *Kalimar* court determined that the mounted lens provision in item 708.23, TSUS, was not applicable to the copier since "the importation is more than a transparent substance used to form an image fixed in a proper backing, support or setting" (id. at 116).

Similarly here, it is patently clear that while the Varotal 30 includes a "transparent substance used to form an image fixed in a proper backing, support or setting", the merchandise also includes many significant electrical and mechanical components that are not embraced by the common meaning of the term mounted lens as determined in *Kalimar*. Accordingly, I agree with plaintiff's contention that the Varotal 30 is more than a mounted lens within the purview of item 708.23, TSUS; and therefore the District Director's classification under that TSUS item was erroneous.

III

Since the Varotal 30 is more than a mounted lens, as classified by Customs, we reach defendant's alternative claim that the merchandise

is classifiable under item 708.89, TSUS, as "Other (optical) appliances and instruments." In determining whether the imported merchandise is classifiable as an optical instrument under the TSUS, the statutory definition of the term in headnote 3, part 2, schedule 7, is controlling. *United States* v. *Ataka America, Inc.*, 64 CCPA 60, 65, n. 4, C.A.D. 1184, 550 F. 2d 33 (1977). Headnote 3 reads:

> 3. The term "optical instruments," as used in this part, embraces only instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

Under the foregoing definition the issue is not whether the optical element is subsidiary or dominant, but rather "the statutory distinction is between 'subsidiary' and *not* 'subsidiary'." [Italic added.] *Ataka*, 64 CCPA at 66, n. 5. It should be stressed that plaintiff does not contend in its brief that the optical elements of the Varotal 30 are subsidiary to the use of the merchandise as a lens system for a television camera, and obviously they are not subsidiary.[9]

In *Norman G. Jensen, Inc.* v. *United States*, 77 Cust. Ct. 9, 13, C.D. 4668 (1976), Judge Maletz observed with reference to headnote 3:

> As stated previously, the imported sights were classified under item 708.89 as other optical appliances and instruments. Also, as stated previously, headnote 3 of part 2, schedule 7 of the tariff schedules defines "optical instruments" as "instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some subsidiary purpose." *Viewed against this statutory definition, it must be concluded that if an imported article consists of one or more optical elements the purpose of which is not subsidiary with regard to the operation of that article, then it is properly classifiable as an optical instrument under the tariff schedules.* See *Amaco, Inc.* v. *United States*, 74 Cust. Ct. 172, 179, C.D. 4602 (1975). See also *Librascope Div. of Singer-General Precision, Inc.* v. *United States*, 76 Cust. Ct. 197, C.D. 4656 (1976). [Italic added.]

Since the Varotal 30 incorporates one or more optical elements which are not subsidiary with regard to the operation of that article, it is properly classifiable as an optical instrument under item 708.89, TSUS.

Plaintiff argues that since the Varotal 30 is an appliance and not an instrument, the definition in headnote 3 of "opitcal *instruments*" [italic added] is inapplicable in this case, "which relieves plaintiff of the burden of establishing that the opitcal portion of the system is used for a subsidiary purpose" (reply brief, 11). This argument is specious.

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[9] The optical components of the Varotal 30 are prominently depicted in schematic form in the manufacturer's promotional brochure (defendant's exhibit B).

Webster's New International Dictionary (2d ed. 1950), p. 1288, cited by plaintiff, broadly defines the term "instrument", as follows: "That by means of which any work is performed or result is effected; a medium; means". Plainly, then, the Varotal 30 is an instrument within the purview of headnote 3.

I am also unable to agree with plaintiff's contention that the merchandise is more than an optical appliance or instrument "as it contains a majority of components that are unrelated to the optical element of this system" (reply brief, 11). The Varotal 30, referred to by plaintiff's witness Murphy as an optical system (R. 29) and as an optical package (R. 42), is essentially a television camera lens with a sophisticated system of electronic and mechanical controls for the iris (aperture), zoom and focus, which are all optical features of the merchandise. Inasmuch as the record shows that the major electromechanical components of the merchandise are directly related to the optical function of the lens system, the electromechanical features of the Varotal 30 do not exclude the merchandise from the definition of optical instruments in headnote 3. *Cf. Corning Glass Works* v. *United States*, 82 Cust. Ct. 249, C.D. 4807 (1979) (machine for optical inspection of ampuls with nonoptical apparatus to mechanize and pace the inspection process).

In support of its "more than" argument, plaintiff strongly emphasizes the Tally light feature of the merchandise. As indicated above, these lights signal to the performers which camera is on the air at the particular time. The testimony of record shows that this feature is essential in television broadcasting. Nevertheless, a careful examination of the manufacturer's promotional brochures (defendant's exhibits B and C) fails to disclose any mention of the Tally light feature. The silence of the promotional brochures respecting the Tally lights is eloquent testimony as to their ancillary and subordinate status relative to the optical components of the merchandise, which are prominently depicted and described in the brochures.

The short of the matter is that, although the merchandise is more than a mounted lens within the common meaning of that term, the lens system herein meets the broader definition of optical instruments in headnote 3, and thus, falls within the purview of item 708.89, TSUS, as alternatively claimed by defendant. Since the subject merchandise is specifically provided for as an optical appliance or instrument under item 708.89, TSUS, classification as a part of a television camera under item 685.10, TSUS, is precluded by general interpretative rule 10(ij).[10] *Cf. Jensen, supra,* 77 Cust. Ct. at 21. Inasmuch as no reliquidation may be had in this case at the higher

[10] Rule 10(ij) provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but *does not prevail over a specific provision for such part*". [Italic added.]

rate of duty applicable to "Other (optical) appliances and instruments" under item 703.89, TSUS, the action is dismissed without affirming the classification by the District Director. See *Sumitomo Shoji New York, Inc.* v. *United States*, 64 Cust. Ct. 299, 304, C.D. 3994 (1970).

Judgment will be entered accordingly.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

Department of the Treasury, *August 4, 1980.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

Robert E. Chasen,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P80/116	Ford, J. July 28, 1980	Rohr Industries, Inc.	77-1-00003, etc.	Item 680.47 $1.12 ea. + 17.5%	Item 690.40 5.5%	Rohr Industries, Inc. v. U.S. (C.D. 4824)	Los Angeles Voith turbo transmissions
P80/117	Boe, J. July 28, 1980	Mobay Chemical Corp. et al.	78-2-00254	Item 406.70 20% (items marked "A") Item 409.00 7¢ per lb. +	Item 405.25 1.4¢ per lb. + 9% (items marked "A") Item 406.70 24%	Agreed statement of facts	New York White or black urethane pastes (items marked "A"); urethane pastes other than those de-

				45%; 6.3¢ per lb. + 40%; 5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%; 4¢ per lb. + 27%; 3.5¢ per lb. + 22.5% (items marked "B")	(items marked "B")		scribed as black or white (items marked "B")
P80/118	Re, C. J. July 29, 1980	Kombi Ltd.	76-3-00626	Item 705.35 15% Item 705.58 25%	Item 734.97 9%	Stonewall Trading Co. v. U.S. (C.D. 4023)	New York Ski gloves, ski mitts or ski mittens

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/223	Boe, J. July 28, 1980	Federal Pacific Electric Co.	78-12-02282	Export value	Invoice unit prices, net packed, as set forth in entries and invoices	Agreed statement of facts	Buffalo Switches, switchboard parts and relays
R80/224	Boe, J. July 28, 1980	Uniroyal, Inc.	78-10-01770	American selling price	$5.25 per pair, less 2%, net, packed	Agreed statement of facts	Los Angeles Footwear for children and juniors
R80/225	Re, C. J. July 29, 1980	Holly Stores, Inc.	76-12-02740	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.
R80/226	Re, C. J. July 29, 1980	S. S. Kresge Co.	74-5-01190, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	New York Wearing apparel, etc.

R80/227	Re, C. J. July 29, 1980	S. S. Kresge Co.	77-5-00712, etc.	Export value	Appraised values shown on entry papers less additions included in appraised values to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Longview (Portland, Oreg.) Wearing apparel, etc.
R80/228	Newman, J. July 29, 1980	Gehrig, Hoban & Co., Inc.	R69/3348, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York Machine tools and accessories and parts thereof
R80/229	Newman, J. July 29, 1980	Gehrig, Hoban & Co., Inc., a/c Charmilles Corp. of America, and Frank P. Dow Co., Inc., a/c Charmilles Corp. of America	71-8-00876	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	New York; Portland, Oreg. Machine tools and accessories and parts thereof
R80/230[1]	Boe, J. July 29, 1980	Charmilles Corp. of America	78-4-00649, etc.	United States value	Determined by adding to f.o.b. unit invoice price in Swiss francs converted to a dollar value at rate of exchange in effect at time of entry (the "claimed value"), 53% of difference between claimed value and appraised value	Agreed statement of facts	Los Angeles Machine tools and accessories and parts thereof

See footnote at end of table.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R80/231	Boe, J. July 29, 1980	Federal Pacific Electric Co.	76-5-01290	Export value	Invoice unit prices, net packed, as set forth in entries and invoices	Agreed statement of facts	Buffalo Switches, switchboard parts and relays

[1] Decision and judgment vacated and set aside by order of the court entered Aug. 13, 1980. See reappraisement abstract No. R80/260 for decision and judgment entered on Aug. 13, 1980.

Rehearing Motion Filed

July 28, 1980

Ben R. Hendrix Trading Co., Inc. *v.* United States, Court No. 79–6–01042.—Memorandum Opinion and Order Granting Defendant's Motion to Dismiss.—C.D. 4861. Motion by plaintiff.

Appeal to U.S. Court of Customs and Patent Appeals

Appeal 80–36. United States *v.* Philipp Overseas, Inc.—STAINLESS STEEL ANGLES—ANGLES OF ALLOY IRON OR STEEL: DRILLED, PUNCHED, OR OTHERWISE ADVANCED; NOT DRILLED, NOT PUNCHED, AND NOT OTHERWISE ADVANCED—TSUS. Appeal from C.D. 4859.

In this case certain stainless steel angles were assessed with duty at the rate of 8.5 percent ad valorem, plus additional duties on the chromium and molybdenum content, under the provision in item 609.86, Tariff Schedules of the United States, as modified by T.D. 68–9, for angles of alloy iron or steel, drilled, punched, or otherwise advanced. The Customs Court held that the merchandise was properly dutiable as claimed by plaintiff-appellee at the rate of 0.1 cent per pound plus 2 percent ad valorem, plus additional duties on the chromium and molybdenum content, under the provision in item 609.82, as modified by T.D. 68–9, for angles of alloy iron or steel, not drilled, not punched, and not otherwise advanced.

It is claimed that the Customs Court erred in finding and holding that the merchandise in issue is properly classifiable and dutiable under item 609.82, supra; in not finding and holding that the merchandise is properly classifiable and dutiable under item 609.86, supra; in finding and holding that the processes of annealing and pickling are not advancements for purposes of classification under item 609.82 or item 609.86, supra; in not finding and holding that the annealing and pickling processes performed on the imported merchandise after hot rolling resulted in the merchandise being otherwise advanced and thereby properly classifiable under item 609.86, supra; in applying the doctrine of ejusdem generis in support of its finding that the processes of annealing and pickling did not result in the imported merchandise being otherwise advanced for purposes of classification under item 609.82 or 609.86, supra.

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the Office of Regulations and Rulings, U.S. Customs Service, and not otherwise published, is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Treasury decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the Office of Regulations and Rulings.

A copy of any decision included in this listing, identified by its date and file number, may be obtained in a form appropriate for public distribution upon written request to the Office of Regulations and Rulings, attention: Legal Reference Area, room 2404, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. These copies will be made available at a cost to the requester of 10 cents per page. However, the Customs Service will waive this charge if the total number of pages copied is 10 or less.

Decisions listed in earlier issues of the CUSTOMS BULLETIN, through July 2, 1980, are available in microfiche format at a cost of $23.85 (15 cents per sheet of fiche). It is anticipated that additions to the microfiche will be made quarterly and subscriptions are available. Requests for the microfiche now available and for subscriptions should be directed to the Legal Reference Area. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: August 12, 1980.

JOHN T. ROTH,
Acting Director,
Regulations and Research Division.

Date of decision	File No.	Issue
7-23-80	104613	Instruments of international traffic: 55-gallon drums used to transport soya bean oil
6-17-80	104702	Vessels: Applicability of tariff schedules to yachts and pleasure boats
7-21-80	104712	Carrier control: Whether transportation of repair equipment between U.S. ports on foreign-flag vessel violates the coastwise laws; whether repairmen are passengers
7-10-80	712582	Country-of-origin marking: Commercial chinaware to be sold to institutional customers
7-14-80	713116	Prohibited and restricted importations: Whether a copyright notice may be put in a book published in Italy by a U.S. author
7-14-80	713201	Prohibited and restricted importations: Whether automobile is subject to Federal motor vehicle safety and emission standards
7-11-80	055491	Classification: Front freewheeling mechanism for bicycles (732.42, 912.10)
7-11-80	056515	Classification: Front freewheeling mechanism for bicycles (732.42, 912.10)
7-16-80	061212	Classification: Front freewheeling mechanism for bicycles (732.42, 912.10)
6-25-80	061520	American selling price: Men's protective boot (700.60)
6- 4-80	061535	Classification: Plastic soldiers; plastic tanks (737.15, 737.40, 737.95)
6-30-80	061542	Classification: Whether certain gloves are ski equipment (705.85, 735.06, 735.07)
7-11-80	061734	American selling price: Protective boot (700.60)
6-25-80	061792	Classification: Tire protection chains (652.30, 652.33, 652.35)
7-11-80	061844	Classification: Dolls with story flaps (737.22)
3-31-80	061850	American selling price: Child's protective boot (700.60)
6-25-80	061897	Classification: Tire protection chain (652.35)
7-11-80	061901	American selling price: Woman's open-toe, open-back, ankle-strap casual shoe (700.60)
6-25-80	061925	American selling price: Men's protective boot (700.60)
6-25-80	061997	American selling price: Men's fabric upper, rubber-soled footwear (700.60)
6-25-80	062809	Classification: Hang gliders (694.21, 694.31, 694.64, 694.65)
6-29-80	064372	Classification: Bicycle hubs (732.41, 732.42, 912.10)
6- 4-80	064501	Classification: Skidding winches designed to be mounted on tractors (664.10, 692.30, 666.00, 870.40)
6-25-80	064539	Classification: Dolls (737.22)
7-11-80	064687	Classification: Color brush (750.50, 750.55, 760.05, 760.15)
6- 4-80	064797	Classification: Plastic miniature trees (748.20, 774.45)
7-11-80	065000	Classification: Whether a neck strap and textile loops on the collar of a woman's jacket are ornamental

Date of decision	File No.	Issue
6-29-80	065033	Classification: Miniature bricks used by hobbyists for use in building doll houses (532.11, 737.55, 737.95)
7-11-80	065060	Classification: Timing belt used with textile machinery (358.14, 358.16, 670.06)
6-29-80	065082	Classification: Woven cotton fabric with small amount of rayon fibers; whether wholly of cotton
6-30-80	065100	American selling price: Woman's closed-toe, closed-back, ankle-strap casual shoe with unit molded sole and corduroy upper (700.60)
6-30-80	065101	American selling price: Woman's closed-toe, closed-back, casual shoe with instep straps and rubber/plastic soles (700.60)
6-16-80	065146	Classification: Plastic whistle closure device for tube of candy (737.95)
6-30-80	065185	Classification: Air deflectors (692.27, 774.60)
6-29-80	066026	Classification: Hydraulic firebrick compacting presses (678.20)
6-30-80	066048	Classification: Hydraulic glass-forming press (678.30, 851.60)
7-11-80	066057	Classification: Luggage carriers (692.60)

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs officers and others concerned.

R. E. CHASEN,
Commissioner of Customs.

In the Matter of
CERTAIN SPRING ASSEMBLIES AND COMPONENTS THEREOF, AND METHODS FOR THEIR MANUFACTURE
} Investigation No. 337–TA–88

Notice of Investigation

Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on June 23, 1980, and amended on July 8, 1980, under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and 19 U.S.C. 1337a, on behalf of Kuhlman Corp., 2565 West Maple, Troy, Mich. 48084. The amended complaint (hereinafter referred to as the complaint) alleges unfair methods of competition and unfair acts in the importation into the United States of certain spring assemblies, or in their sale, because such spring assemblies infringe claims 1, 2, and 7–11 of U.S. Letters Patent 3,782,708, and are made in accordance with claims 1–37 of U.S. Letters Patent 3,866,287. Moreover, the complaint alleges that the effect or tendency of the unfair methods of competition and unfair acts is to destroy or substantially injure an industry, efficiently and economically operated, in the United States.

Complainant requests the Commission, following a full investigation, to order permanent exclusion from entry into the United

States of the imports in question, and to provide such other relief as the Commission deems appropriate. Complainant also requests the Commission, during the pendency of the investigation, to order temporary exclusion from entry into the United States of the imports in question.

Having considered the complaint, the Commission, on July 22, 1980, ordered that—

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), an investigation be instituted to determine whether there is reason to believe that there is a violation and whether there is a violation of subsection (a) of this section in the unauthorized importation of certain spring assemblies and components thereof into the United States, or in their sale, because such spring assemblies are alleged to be covered by claims 1, 2, and 7–11 of U.S. Letters Patent 2,782,708 and to be made in accordance with claims 1–37 of U.S. Letters Patent 3,866,287, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States;

(2) For the purposes of this investigation, the following are hereby named as parties upon which this notice of investigation shall be served:

(a) The complainant is—

Kuhlman Corp.
2565 West Maple
Troy, Mich. 48084

(b) The respondents are the following companies alleged to be engaged in the unauthorized importation of such spring assemblies into the United States, or in their sale, and are parties upon which the complaint is to be served:

P. J. Wallbank Manufacturing Co., Ltd.
P.O. Box 99, Highway 97
Plattsville, Ontario, Canada N0J 150

Ford Motor Co.
Ford World Headquarters
American Road
Dearborn, Mich. 48121

General Motors Corp.
3044 West Grand Boulevard
Detroit, Mich. 48202

(c) John Milo Bryant, Unfair Import Investigations Division, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall be the Commission investigative attorney, a party to this investigation; and

(3) For the investigation so instituted, Donald K. Duvall, Chief Administrative Law Judge, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, shall designate the presiding officer.

The phrase "and components thereof" has been added to paragraph (1) above on the basis of informal investigatory activities by the Commission, which revealed that spring assemblies of the type alleged to infringe claims 1, 2, and 7–11 of U.S. Letters Patent 3,782,708 and to be made in accordance with claims 1–37 of U.S. Letters Patent 3,866,287 can be imported in component parts as well as entirely assembled units. In addition, General Motors Corp. and the Ford Motor Co. have been included as respondents in paragraph 2(b) above on the basis of the informal investigatory activities of the Commission.

Responses must be submitted by the named respondents in accordance with section 210.21 of the Commission's Rules of Practice and Procedure (19 CFR 210.21). Pursuant to sections 201.16(d) and 210.21(a) of the rules, such responses will be considered by the Commission if received not later than 20 days after the date of service of the complaint. Extensions of time for submitting a response will not be granted unless good and sufficient cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the presiding officer and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter both a recommended determination and a final determination containing such findings.

The complaint is available for inspection by interested persons at the Office of the Secretary, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and in the Commission's New York office, 6 World Trade Center, Suite 655, New York, N.Y. 10048.

By order of the Commission.

Issued: August 4, 1980.

KENNETH R. MASON,
Secretary.

Notice of Request for Public Comment on Termination of Countervailing Duty Investigation Concerning Chains and Parts Thereof of Cast Iron or Steel from Italy

AGENCY: U.S. International Trade Commission.

ACTION: Request for public comments on proposed termination of

countervailing duty investigation under section 704(a) of the Tariff Act of 1930 and section 104(b) of the Trade Agreements Act of 1979, with regard to chains and parts thereof of cast iron or steel from Italy.

EFFECTIVE DATE: Date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT: Mr. Lynn Featherstone, Office of Investigations; telephone 202–523–1376.

SUPPLEMENTAL INFORMATION: Section 104 of the Trade Agreements Act of 1979 contains the provisions for dealing with countervailing duty orders which had been issued under section 303 of the Tariff Act of 1930 as amended (19 U.S.C. 1303) prior to January 1, 1980. Where such orders are in effect, and have not been waived, section 104(b) requires the Commission to conduct an investigation upon the request of a government or a group of exporters of merchandise covered by the order, to determine whether an industry in the United States would be materially injured, threatened with material injury, or whether the establishment of such industry in the United States would be materially retarded if the order were to be revoked. Such investigation (similar to investigations carried under title VII of the Trade Agreements Act) must be completed within 3 years of the date of its commencement (sec. 104(b)(3)).

On March 28, 1980, the Commission received a request from the delegation of the Commission of European Communities for the review of the following countervailing duty order, inter alia: Chains and parts thereof, of cast iron or steel from Italy—T.D. 77–249 (42 F.R. 54799 Oct. 11, 1977).

The Commission has also been notified by counsel for the National Association of Chain Manufacturers, the original petitioner in the case leading to these countervailing duty orders, that the association wishes to "withdraw its petition" with regard to chains and parts from Italy.

While there is no provision in the Trade Agreements Act of 1979, or in its legislative history, permitting termination of a transition case investigation, termination of a properly instituted countervailing duty investigation is permitted under section 704(a). That section directs the Commission to solicit public comment prior to termination and approve such termination only if it is in the public interest. Since termination is permitted under newly filed countervailing duty petitions, it should also be permitted in existing countervailing duty orders.

In light of the Commission's duty to consider the public interest, the Commission hereby requests written comments concerning the proposed termination of an investigation with regard to chains and

parts thereof from Italy. These written comments must be filed with the Secretary of the Commission no later than 30 days after the date of publication of this notice in the Federal Register.

By order of the Commission.

Issued: July 30, 1980.

KENNETH R. MASON,
Secretary.

Index

U.S. Customs Service

Customs Court

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